Supreme Court, U.S.
FILED

981662 APR 14 1999

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

October Term, 1998

ROBERT D. ALEXANDER,

Petitioner,

vs.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

GEORGE V. WARREN
Counsel of Record
847 W. Willow, Nandy House
Lansing, Michigan 48906
(517) 484-5050

Attorney for Petitioner

April 12, 1999

QUESTIONS PRESENTED FOR REVIEW

I. Whether state employee Petitioner's right to Equal Protection was violated by the unequal and more severe penalty imposed on state and local employees, **removal with an eighteen month debarment**, being 5 U.S.C. §1505 (2) and §1506 (a)(1) and (2), *versus* the lesser penalties for federal employees, **varying from removal with no debarment to suspension without pay for not less than 30 days**, being 5 U.S.C. §7326, for the same violation of the Hatch Political Activity Act (Hatch Act or the Act) -- candidacy for partisan elected position? This question is crucial in that the federal Administrative Law Judge recommended that Petitioner not be penalized after hearing three days of testimony, especially due to improper actions or inactions by the Office of Special Counsel (OSC), the prosecutorial arm of the Act.

II. Whether Petitioner State Employee's right to Due Process was violated by the Merit Systems Protection Board (MSPB) refusal to recognize the sanctity of Michigan's civil service mandated 60-day unpaid leave for partisan candidacy?

III. Whether Petitioner's request for an Olenhouse Hearing on his Motion to Dismiss should have been granted by the District Court?

PARTIES TO THE PROCEEDING

The parties to the proceedings before this Court are Robert D. Alexander, a state civil service employee residing in East Lansing, Michigan, and the Merit Systems Protection Board, which is the administrative agency of the federal Hatch Act located in Washington, D.C.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	vi
Citations to Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	4
ARGUMENT	11
I. Why state employee Petitioner 's right to Equal Protection was violated by an unequal, more severe penalty for state employees versus a lesser penalty for federal employees for the same violation of the Hatch Act- candidacy for partisan elected position.	11
A. Harsh state employee penalty for the same violation of the Act for no reasonable cause is Unconstitutional on its face in violation of Equal Protection of the laws, US Constitution Amendments V and XIV.	11

B. Harsher Penalty for State Employees for the Same Violation of the Act for No Reasonable Cause is Unconstitutional as Actually Applied. 15

C. Much "congressional intent" for putting state employees under the Act in 1940 is no longer reasonable in that Congress in 1974 allowed state employees to participate in partisan campaigns and be a non-partisan candidate, and many states, including Michigan, began procedures for state employees to be partisan candidates while on civil service mandated, unpaid leaves of absence. 16

D. Supreme Court Has Yet to Address as Constitutional the State Employee Penalty for Violation of the Act by Partisan Candidacy. 18

II. Why Petitioner State Employee's right to Due Process was violated by the MSPB's refusal to recognize the sanctity of Michigan's civil service mandated leave for partisan candidacy. 21

III. WHY *CERTIORARI* SHOULD BE GRANTED 21

A. Conflict between the Sixth and the Fifth and Tenth Circuits 22

B. Unique Equal Protection Issue Implicated In Structure and Application of Hatch Act Penalty Provisions 23

C. This Court should give a definitive interpretation to a federal statute in its supervisory authority over the lower federal courts and administrative agencies 25

1. Recent MSPB decisions, DeMeo, Malone, and Reckard, vastly accentuate the Unique Equal Protection Issue Implicated in the Structure and Application of the Hatch Act's Penalty Provisions 25

2. MSPB in DeMeo did not lessen the far more severe debarment penalty for state employees who violate the same provisions of the Act 28

IV. CONCLUSION 30

APPENDIX A - OPINION filed January 29, 1999, in U.S. Court of Appeals for the Sixth Circuit A 1

APPENDIX B - OPINION AND ORDER filed September 30, 1997, in U.S. District Court for the Western District of Michigan A 21

APPENDIX C - FINAL DECISION AND ORDER filed October 4, 1996, by the Merit Systems Protection Board in Washington, D.C. A 35

APPENDIX D- RECOMMENDED DECISION filed July 30, 1995, by the Administrative Law Judge in Washington, D.C. A 45

APPENDIX E - Comparison of Federal, State, and Local Employees' Hatch Act Violations, Mitigating Circumstances, and Penalties A 58

TABLE OF AUTHORITIES

U.S. Constitutional Amendment	**Page**
5th Amendment	2, 11
10th Amendment	13, 14
14th Amendment	2, 11
Federal Statute	
Age Discrimination in Employment Act, ADEA	14
Hatch Political Activity Act,	
5 U.S.C. § 1501 et. seq.	i, 3, 4, 11, 12, 18, 28
5 U.S.C. § 7321 et. seq.	i, 3, 11, 12, 25, 28
Title 28, U.S.C. § 1254(1)	1
Social Security Act, Medicaid	
42 C.F.R. Parts 430-489	6
Federal Cases	
Biller and Sombrotto v US MSPB [863 F2d 1079 (2nd Cir. 1988)]	13, 20
Blaylock v. MSPB [851 F.2d 1348 (11th Cir. 1988)]	20
Broadrick v Oklahoma, 413 U.S. 601 (1973)	19, 20
Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989)	14
Girling Health Care, Inc. v Shalala, 85 F.3d 211, 214 (5th Cir. 1996)	23
Johnson v. Mayor & City Council of Baltimore, 472 U.S. 353, 366 n. 10 (1985)	15
Minnesota Department of Jobs & Training v M.S.P. B., 875 F.2d at 182 (8th Cir. 1989) (en banc)	21

Federal Cases (cont'd)

Oklahoma v. U. S. Civil Service Commission, 330 U.S. 127, 142-144 (1947). 19

Olenhouse v. Commodity Credit Corp., 42 F. 3d 1560 (10th Cir. 1994) i, 2, 11, 22, 23

State of Conn., DHR v US MSPB, 718 F. Supp. 125 (D.Conn. 1989) 20

United Public Workers V. Mitchell, 330 U.S. 75, 93-102 (1947) 19, 27

United States v. Lovett, 328 U.S. 303, 316, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252 (1946) 29

U. S. Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 568-71 (1973) 19, 27

Williams v. U.S. M.S.P.B., 55 F.3d 917, 922 (4th Cir. 1995) 12, 19

Law Review and Similar Legal Publications

Congressional Record, Vol. 86, Part 3, 2338 (1940) 17

Congressional Record, Vol. 86, 9447 (1940) 20

Congressional Record,, pp. 8637, 8643 (1950) 17

Congressional Record, p. 12078 (1950) 18

Davis, Public Employee Politics, 44 ALR Fed 311 (1979) 16

(Senate Report on Hatch Act Reform Amendments of 1993, No. 103-57, June 16, 1993) 18

Sutherland Statutory Construction, (5th Edition 1992) 26-27, 28-29

M.S.P.B. Decisions

All MSPB Decisions ordering penalties during 1984-97 are listed in chronological order in Appendix E at A 58. MSPB decisions cited in the Writ of Certiorari are:

Special Counsel v. Alexander (Appendix C at A 35) [71 M.S.P.R. 636 (1996)] 1, 10

S. C. v. Andrezjwski [63 M.S.P.R. 495 (1994)] 5, 24

S. C. v. Baker, [75 M.S.P.R. 155 (1997)] 5, 15, 24

S. C. v. Bradford, [71 M.S.P.R. 441 (1996)] 5, 24

S. C. v. Camillieri [35 M.S.P.R. 170 (1987)] 20

S. C. v. Campbell [58 M.S.P.R. 170 (1993)] 5, 15, 24

S. C. v. Carney, [31 M.S.P.R. 32 (1986)] 5, 24

S. C. v. DeMeo, [77 M.S.P.R. 158 (1997)] 25, 26, 27-29

S. C. v. Dominguez, [55 M.S.P.R. 652 (1992)] 5, 24

S. C. v. Edenfield, [52 M.S.P.R. 327 (1992)] 5, 15, 24

S. C. v. Johnson, [31 M.S.P.R. 32 (1986)] 5, 24

S. C. v. Kelley, [60 MSPB 668 (1994)] 10

S. C. v. Majure, [43 M.S.P.R. 511 (1990)] 5, 24

S. C. v. Malone (77 M.S.P.R. 477 1998) 25, 29

S. C. v. Reckard, [69 M.S.P.R. 130 (1995)], S. C. v. Reckard [77 M.S.P.R. 651 (1998)] 5, 24, 25, 28

S. C. v. Seastrunk [28 M.S.P.R. 51 (1985)] 5, 24

S. C. v. Walker, [67 M.S.P.R. 271 (1995)] 5, 24

S. C. v. Winkleman, [36 M.S.P.R. 692 (1988)] 20

State of Michigan Rules and Regulations

Civil Service Rules 1-5 19

PETITION FOR WRIT OF *CERTIORARI*

Petitioner, Robert Alexander, respectfully requests that a writ of *certiorari* be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case filed on January 21, 1999.

CITATIONS TO OPINIONS BELOW

The January 29, 1999, opinion of the United States Court of Appeals for the Sixth Circuit of is a reported affirmance of the district court opinion. (Alexander v. Merit Systems Protection Board, 165 F.3d 474, 1999 FED App. 002 0P (6th Cir.) (File: 99a0020p.06) (Appendix A at A 1 - A 20).

The September 30, 1997, opinion of the United States District Court for the Western District of Michigan is reported as Alexander v. Merit Systems Protection Board, (Appendix B at A 21 - A 34).

The October 4, 1996, final decision and order of the United States Merit Systems Protection Board is reported as Special Counsel v. Alexander, 71 M.S.P.R. 636, 640 (1996) (Appendix C at A 35 - A 44).

The July 30, 1995, recommended decision of the federal administrative law judge is unreported (Appendix D at A 45 - A 57).

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This Court has jurisdiction pursuant to Title 28, United States Code §1254(1). The issues in this case are the unconstitutional differences between the penalties for state and local employees as compared to the penalties for

federal employees for the same violation of the federal Hatch Political Activity Act, the lack of appropriate evaluation by the District Judge of the confusion in the determination of coverage of state employees by the Act, and Petitioner's entitlement to an Olenhouse Hearing in opposition to Merit Systems Protection Board's (MSPB) Motion to Affirm.

This is an appeal from the OPINION AND ORDER granted on September 30, 1997, by the U.S. District Court for the Western District of Michigan (Wendell A. Miles, Senior Judge), which was affirmed by the United States Court of Appeals for the Sixth Circuit (Ralph B. Guy, Jr, Senior Circuit Judge) on January 21, 1999.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be... deprived of life, liberty, or property, without due process of law...."

The Fourteenth Amendment to the United States Constitution provides in relevant parts:

"Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws....

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

5 U.S.C. § 7326. The federal employee penalty:

"An employee or individual who violates section 7323 or 7324 of this title shall be removed from his position, and funds appropriated for the position from which removed thereafter may not be used to pay the employee or individual. However, if the Merit Systems Protection Board finds by unanimous vote that the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board."

5 U.S.C. § 1505 and 1506. The state and local employee penalty:

"§ 1505. ...After this hearing, the Merit Systems Protection Board shall-

(1) determine whether a violation of section 1502 of this title has occurred;

(2) determine whether the violation warrants the removal of the officer or employee from his office or employment; and

(3) notify the officer or employee and the agency of the determination by registered or certified mail."

""§ 1506. ...(a) When the Merit Systems Protection Board finds--

(1) that a State or local officer or employee has not been removed from his office or employment within 30 days after notice of a determination by the Board that he violated section 1502 of this title and that the violation warrants removal; or

(2) that the State or local officer or employee has been removed and has been appointed within 18 months after his removal to an office or employment in the same State in a State or local agency which does not receive loans or grants from a federal agency; the Board shall make and certify to the appropriate Federal agency an order requiring that agency to withhold from

its loans or grants to the State or local agency to which notice was given an amount equal to 2 years' pay at the rate the officer or employee was receiving at the time of the violation. When the State or local agency to which appointment within 18 months after removal has been made is one that receives loans or grant from a Federal agency, the Board order shall direct that the withholding be made from that State or local agency...."

STATEMENT OF THE CASE

This matter is before this Court on the petition of Petitioner, Robert Alexander, for a writ of *certiorari* to the Sixth United States Circuit Court of Appeals to review that Court's January 21, 1999, decision affirming the OPINION and ORDER of the United States District Court for the Western District of Michigan, which granted the MSPB motion to affirm its decision imposing an 18-month debarment penalty upon Petitioner. The basis for federal jurisdiction in the District Court was 5 U.S.C. §1508. Pursuant to MSPB's Order, the Michigan Department of Community Health (DCH) *terminated* Petitioner's employment of 18 years on October 22, 1996. Although Petitioner was reinstated after the 18-month debarment period by a state ALJ, the state has appealed seeking the permanent termination of Petitioner's employment.

The essence of this case is that Petitioner, a veteran state policy negotiator with federal Medicaid officials, called OSC and asked valid questions about the Act. OSC did not answer many questions correctly or verify its answers. Confused, Petitioner went on state mandated unpaid leave to run for office. OSC **did not formally warn** that he was violating the Act and **did not tell** him if he ended his campaign, OSC would drop its investigation. For these and other mitigating circumstances, the ALJ recommended he keep his job, but MSPB ordered his removal and he was terminated!

Since 1984 MSPB has penalized 25 state employees for partisan candidacy- 23 were ordered removed and 2 retired before removal ordered. Since 1984 MSPB has penalized 12 federal employee/candidates. Baker, Campbell, and Edenfield violated the Act, **OSC formally warned** them of their violations and told Baker to stop and the others not to run again. All violated the Act again. **MSPB's weak suspensions were 30 days for Campbell and Edenfield and 90 days for Baker**. Other federal employee/candidates, Walker, Andrezjwski, Majure, and Seastrunk were not warned, but were suspended only 30-45 days:. Bradford and Reckard retired prior to removal, and **only 3 were removed**: Dominguez, Carney, and Johnson. Such differences in penalties between state employees versus federal employees are unconstitutional. (App. E at A 58)

In March 1986 Petitioner was hired in the state civil service as a Departmental Analyst in the Department of Social Services (DSS) Energy Program. **He received no information about the Hatch Act**. Due to Hatch Act changes in the 1970s, **state employees were allowed to engage in "partisan political activity"** but could **not** be a partisan candidate if covered by the Act. State employees were informed they could run **for partisan office if federal funding of their positions was not through "loans or grants" or their positions were all state-funded.** By 1988 MI Civil Service Rules allowed a **state employee to run for partisan political office with a 60-day unpaid leave of absence.**

In 1991 DSS was reorganized and its Office of Human Relations (OHR) improperly demoted many employees including Petitioner, who was assigned to DSS's Medical Services Administration (Medicaid). Petitioner grieved that OHR did not follow MI Civil Service Rules. A state ALJ restored him to his prior level. This experience ruined Petitioner's trust in OHR, and his **distrust of OHR**

continued when a few weeks later he called OHR's Paul Servais about Hatch Act coverage.

In 1991 Petitioner had no orientation to the Medicaid program. **His duties included "negotiations" with federal health policy officials.** He regularly cited regulations. He began working of state long term care issues in Vol. 4 of the five volumes of health regulations. His area was 42 C.F.R. Parts 440-489, which did not mention **"loan or grant"** once! He was unaware that the first section of Medicaid law, Part 430, used the term **"grant"** 17 times in 13 pages. Part 430 concerned only about 5 DSS fiscal analysts and was 260 pages before Parts 440-489 that were his responsibility.

In March 1992 Petitioner heard the Ann Arbor State Representative would run for Judge. Petitioner knew that:

1. most information he had on Hatch Act coverage was incorrect because it used "federally-funded program" instead of the legal "federally funded through **loans or grants**" specific limitations;
2. all federal funding for his program and salary came through reimbursement by federal funds for prior state expenditures, and he did not know if it was a **loan or a grant** for Hatch Act coverage;
3. state employees whose salaries were funded by federal funds through **loans or grants** could work on partisan campaigns; and
4. the Act prohibited partisan candidacy by state employees funded through **loans or grants**. That was a federal statute, not a "loophole;"

Not one Medicaid employee knew if federal reimbursement was through a **loan or grant**. He discussed his efforts to obtain answers with his boss, Ed Kemp. He wanted a verified answer that he was covered by the Act or not. Dr. Kemp felt he was covered, but had no verification, and urged him to call DSS/OHR.

On April 9, 1992, Petitioner called OHR's Paul Servais stating that he worked in Medicaid and was considering running for State Representative. Mr. Servais misstated that 1) the Act covered him because Medicaid was a "federally funded" program; and, 2) he could not run for precinct delegate. Petitioner asked him to verify his opinion about coverage. Mr. Servais did not do so.

Petitioner called other state departments to find if the Act covered state employees whose positions were reimbursed by federal loans or grants. No one knew. He called the MI Department of Civil Service (MDCS) about the Act and the state civil service mandated 60-day unpaid leave of absence to campaign for partisan office. Petitioner received the 1988 MDCS "Discussion Paper: Political Activities by Classified Employees; Political Solicitation and Support; and, the Federal Hatch Act." That study stated that the Act had "more than 3,000 confusing and contradictory rules," which confused Petitioner even more.

On April 22, 1992, Petitioner called Paul Servais to resolve Petitioner's confusion if the Act covered a "reimbursed" employee. Mr. Servais had no verification, but suggested Petitioner call Heidi Weintraub at 202-653-7188, "his federal Hatch Act contact in DC who answered his questions." Petitioner called Ms. Weintraub, who did not explain that she was an OSC prosecuting attorney. His brief phone call with the abrupt Ms. Weintraub was extensively discussed in the hearing and Stipulations. Ms. Weintraub refused to verify her answers to his questions. He felt he should call back when she was less busy.

On April 24, Petitioner called Ms. Weintraub. She said the Act was clear - no confusion. She again refused to verify her opinion that the Act covered Medicaid employees. She did not answer about funding through a **loan or grant**. Her misstatement that the act covered state employees if federal funding "was more than 1%" was contradicted by

OSC's investigator in July 1992 and OSC's attorney. Her answer that the Act covered part-time workers was contradicted by a talk Paul Servais had with another OSC lawyer, which he detailed in a June 11, 1990, memo. She said Petitioner would receive a booklet that would "answer all your questions." He received it, but it failed to mention coverage of Medicaid employees or that Medicaid reimbursement to was through **loans or grants**. The booklet stated he could call or submit written questions. After two frustrating calls and OSC's few correct, competent answers to his specific questions, he stopped calling OSC for verified answers to his questions about Hatch Act coverage.

Petitioner received no specific, written answers to his questions if the Act covered state positions reimbursed with federal funds. Although Ms. Weintraub and Mr. Servais knew of Petitioner's candidacy, from May 18, 1992, to July 23, 1993, he received no oral or written OSC opinion that he should stop his campaign. He received no special **OSC written or oral warning** that due to his candidacy, DSS would terminate him and prevent employment by any other state or local agency for at least eighteen months. All he received was in April 1992- a poor copy of a 1988 Hatch Act booklet, probably sent by Ms. Weintraub with no cover memo, that did not answer his questions to Ms. Weintraub.

A **major reason that the ALJ recommended Petitioner keep his position** was OSC's lack of effort to answer questions and prevent violations:

> If anyone should have been expected to take the time to explain to (him) how Medicaid reimbursements are treated for purposes of the Act it should have been OSC employee Weintraub...(she) could have taken the time to research the public statutes and give (him) the answer he received eventually from the HCFA employee... To complain that (he) ... should have asked for a written advisory opinion..is not reasonable. (App. D at A 50)

Petitioner had to regularly "verify" his Medicaid policy statements, as he worked on Non-Covered Services and Resident Rights policies with Jerry Spatz, a monitor for the Health Care Financing Administration. Much of their communications required answering policy questions with legal verification.

On May 11, 1992, Petitioner filed as a candidate for the Democratic nomination in the 53rd State Representative District. His campaign was within MI Civil Service Rules, because he took the required 60-day unpaid leave for a partisan candidacy. He felt **he was not covered** by the Act because Servais and Weintraub gave him wrong facts and had not verified their opinions that Medicaid "reimbursed" employees were covered by the Act. During the ALJ hearing he learned that OSC gives an **"opinion"** about coverage by the Act, and issues a far stronger **"warning"** when the Act is violated. Petitioner had no **OSC warning**.

Petitioner on May 12 notified DSS's Servais that he had filed and would go on required 60-day unpaid campaign leave on June 5. Petitioner finally spoke with an associate, John Sorbet, who had been on vacation. Mr. Sorbet, a DSS federal funding analyst, flippantly explained that federal reimbursement came to the state as a "so-called grant award." Sorbet knew nothing about the Act and did not verify his views. Petitioner gave little credence to Sorbet's comment because he was **not an authoritative source of information** as defined in the front page notice of OSC's booklet. Petitioner's "authoritative sources" were Servais and Weintraub, who did not answer his questions. He was unaware that he could withdraw his filing the prior day to prevent his possible violation of the Act. On June 3, 1992, Mr. Servais wrote to OSC's Weintraub that Petitioner was a candidate for partisan office, and then Mr. Servais gave an incorrect, negative description of Petitioner's work.

On June 5, 1992, Petitioner began his mandated 60-day unpaid leave of absence to campaign. On June 11 his unpaid leave was approved by OHR's Chris Miller. On July 23 Petitioner was investigated by OSC's Iran Perkins, who recorded 40 minutes of the hour meeting. Mr. Perkins was not an attorney, and said he did not know if Petitioner was violating the Act. **Mr. Perkins did not inform him that if he ended his campaign, OSC would drop its investigation,** as OSC informed other candidates during that same month, *e.g.* Kelley. (Petitioner was shocked a year later to see the interview transcript full of errors and omissions.) On August 4 he finished second in the primary election, was not the Democratic candidate, and returned to work the next week.

On June 24, 1993, Petitioner was notified of his alleged Act violation. Petitioner answered all OSC pre-hearing questions, whereas OSC refused to answer many questions and objected to OSC's Information Officer, Paul Ellis, testifying because "Mr. Ellis is not qualified to testify." On March 22-23, 1994, federal ALJ Delbert R. Terrill, Jr. held the Lansing hearings.

On June 26, 1995, ALJ Terrill held the D.C. hearing on Petitioner's awareness of Mr. Sorbet's comment about "so called quarterly grant awards." On July 31, 1995, the ALJ issued his Recommended Decision that Petitioner had violated the Act by running after his talk with Mr. Sorbet, but mitigating circumstances did not warrant his removal. The most important circumstances were that OSC's actions **"significantly contributed to Alexander's assumption of the risk and accordingly such assumption ought not to be a basis for...removal."** (App. E at A 57)

On October 4, 1996, MSPB issued its Final Decision and ORDER that agreed with the ALJ that Petitioner had violated the Hatch Act, but rejected ALJ's recommendation against removal. MSPB ordered the DSS to remove Petitioner from employment within 30 days, or it would face

withdrawal of federal funding equivalent to twice his annual salary, pursuant to 5 U.S.C. §1506(a)(2).

Oct. 22, 1996, the MI Dept. of Community Health (DCH), which incorporated Medicaid, held a Disciplinary Conference and "terminated" Petitioner. On Nov. 1, 1996, Petitioner filed in U.S. District Court, Western District of Michigan, a MOTION FOR STAY OF THE MSPB'S FINAL DECISION AND ORDER and a PETITION FOR JUDICIAL REVIEW and other materials pursuant to §1508.

On March 21, 1997, Petitioner filed a Request for an Olenhouse Hearing in response to MSPB's Motion to Dismiss. The long-delayed Administrative Record (AR), sent by MSPB, was received by Petitioner's Attorney in an unjust state of disarray. Petitioner compiled and furnished to all an accurate and correct AR.

ARGUMENT

I. **Why state employee Petitioner 's right to Equal Protection was violated by an unequal, more severe penalty for state employees versus a less severe penalty for federal employees for the same violation of the Hatch Act- candidacy for partisan elected position.**

A. **Harsh state employee penalty for the same violation of the Act for no reasonable cause is Unconstitutional on its face in violation of Equal Protection of the laws, US Constitution Amendments V and XIV.**

Whereas 5 U.S.C. §7326 authorizes a range of sanctions for federal employees found to have violated the Hatch Act's prohibition on candidacy in a partisan election, 5 U.S.C. §1506 allows Respondent MSPB only the choice

of removal for no less than eighteen months or no sanction in the case of state employees found to have violated the Act's prohibition on partisan candidacy. Petitioner contends that federal and state employees are similarly situated for purposes of the Act, that the differences in sanctions serve no rational purpose, and that they, therefore, violate the Equal Protection component of the Fifth Amendment.

While the Supreme Court has upheld the Act against a variety of constitutional challenges, the issue presented here is one of first impression. The issue is particularly germane in this case, since the ALJ concluded that circumstances did not warrant his removal. Given the same range of sanctions applicable to federal employees under § 7326, the ALJ in this case could have chosen an appropriately measured penalty -- between the extremes of no sanction and removal-- such as suspension. As Respondent argued, the question:

> whether removal is appropriate depends upon the seriousness of the violation, taking into consideration all aggravating and mitigating factors that bear upon the seriousness of the violation. (Williams v. U.S. M.S.P.B., 55 F.3d 917, 922 (4th Cir. 1995).

But limiting choice under §1506 to either no penalty or removal denies the ALJ the ability to tailor an appropriate penalty in response to those factors of the violation's seriousness, in light of all the aggravating and mitigating factors. Petitioner states there is no rational reason for constraining the ALJ in that manner, and no rational reason for treating state employees so very differently than federal employees.

Respondent asserted that federal and state employees are not similarly situated under the Act. Yet, Respondent cited no supporting authority for the claim, since it is so clearly wrong. The objectives and government

interests in restricting federal and state employees are the same.

> Strong policy reasons argue for restricting the political activities of public employees: (1) the efficient and unbiased administration of the government requires that federal [and state] employees be hired and promoted because of merit rather than ideology; (2) public employees should be protected from political coercion when performing their duties; and (3) the public interest is not served by a bureaucracy run as a federal [or state] political machine. Biller v. U.S. M.S.P.B., [863 F.2d 1079 (2nd Cir. 1988)].

Alternatively, Respondent argued that a rational basis exists for the disparate penalty provisions – that the federal government acts as employer in relation to federal employers, while regulation of state employees is pursuant to an exercise of Congress' spending power. The Tenth Amendment constrains the federal government's power to regulate state employee discipline. Assuming *arguendo* these assertions' validity, they neither explain nor justify different treatment of federal and state employees, nor do they relate to the government's purported interest in regulating partisan political activities of federal and state employees.

While Congress may exercise different powers in reaching state as opposed to federal employees, that does not explain why, once having acquired the power to regulate, different punishments are required or are necessary. Though employers may be different, state and federal employees are subject to similar proscriptions under the Act, and for that reason they are similarly situated. Similar offenses by state and federal employees violate the same government objectives, and for that reason should receive similar penalties.

Equally disingenuous is MSPB's assertion that the Tenth Amendment somehow constrains the range of penalties Congress can impose on state employees under the Act. Respondent argued that "the [federal] power to discipline a state employee is appropriately limited to determining whether removal of the employee from the federally funded program is warranted." Again, Respondent cites no supporting authority for that assertion, nor does it explain why the federal power to discipline is "appropriately" limited to removal only. Yet, Respondent clearly acknowledges that the Tenth Amendment is not an impenetrable barrier to federal regulation of state employee discipline, where employment is federally funded. Finally, MSPB asserts that it "employs the same standard for determining whether an Act violation warrants removal in cases involving federal or state employees," but does not explain why that justifies a different discipline standard.

While this issue is one of first impression, several recent federal court decisions suggest that similarly situated state and federal employees are entitled to the same treatment in a variety of contexts. In Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989), the Supreme Court struck down a Michigan income tax provision exempting from taxation retirement benefits paid by the State, but not exempting retirement benefits paid by the federal government to retirees. As in this case, the benefits were paid by different employers, and the case implicated issues of intergovernmental immunity. Yet, the Court concluded that the taxing scheme was discriminatory against federal retirees and ordered the State to either extend the exemption to federal retirees, or discontinue it for state retirees.

In comparing the validity of mandatory retirement ages for federal and state firefighters under the federal Age Discrimination in Employment Act (ADEA), the Supreme Court noted that "Congress is **not always** required to treat

federal and nonfederal employees in the same way (emphasis added)." See Johnson v. Mayor & City Council of Baltimore, 472 U.S. 353, 366 n. 10 (1985). However, the clear implication is that -- absent a rational justification -- federal law should normally treat similarly situated federal and nonfederal employees the same.

B. Harsher Penalty for State Employees for the Same Violation of the Act for No Reasonable Cause is Unconstitutional as Actually Applied.

The 52 MSPB Hatch Act decisions since 1984, when state employees as candidates on state mandated leaves of absence came to MSPB attention, penalized federal employees far more leniently than state employees for the same violations of the Act. **MSPB ordered "removal" for 31 of 33 state employees for 18 months without pay or ability to work in a federal, state, local or private** agency that received federal funds, and the other 2 retired. **Only 4 of 25 federal** employees were removed, and two removals were based on candidacy **after formal OSC warning.** Yet, **10 other federal employee/candidates** had their penalties **reduced to unpaid suspension for 30-90 days**. OSC **formally warned** federal employee-candidates **Campbell, Edenfield and Baker** of their violations and not to run. But each ran again or continued. MSPB only penalized them with 30 or 90 day suspensions! Petitioner was never officially warned, did not run again, yet he was terminated by the MSPB order. MSPB has given no rational or legal reason for such harsher treatment of state employees.

The "Comparison of Federal, State, and Local Employees' Violations, Mitigating Circumstances, and Penalties," verifies MSPB's arbitrary and capricious investigations, evaluations of violations and final decisions. Many examples of unequal treatment were provided in Petitioner's TRIAL BRIEF for the ALJ Hearing. Somehow

MSPB "misplaced" this Brief with his analysis of the Act and his Exhibit Book of 66 Exhibits in MSPB's storage basement for months while other materials were reviewed. MSPB "forgot" the Brief inside the front cover of his Exhibit Book so that the Brief was excluded from the Administrative Record sent to the Court. Yet, the Court did not address OSC's and MSPB's negative actions in this case. The Court failed to evaluate the unconscionable pattern and practice of the MSPB ignoring the "mitigating circumstances" for state employees verified in his "Comparison." (App. E at A 58.

C. Much "congressional intent" for putting state employees under the Act in 1940 is no longer reasonable in that Congress in 1974 allowed state employees to participate in partisan campaigns and be a non-partisan candidate, and many states, including Michigan, began procedures for state employees to be partisan candidates while on civil service mandated, unpaid leaves of absence.

Congress enacted Sen. Carl Hatch's Act for federal employees to "attract greater numbers of qualified people by insuring their job security, free from the vicissitudes of the elective process, and by protecting them from political extortion." Davis, Public Employee Politics, 44 ALR Fed 311 (1979). Federal employees were prohibited from working in partisan campaigns or being partisan or non-partisan candidates, like school board, where any candidate was endorsed by political parties. Federal employees were "protected" from working or contributing to candidates or campaigns by their superiors or elected officials. Federal employees knew the Act covered government work, and even a small violation would result in dismissal for life.

In 1939 the Act had strong congressional support, debate was limited, and filled less than 50 pages in the

Congressional Record (CR). Yet, this separation of employees from the "evils of campaigning and partisan politics" turned out to be very complex. The Act's "pure" intent was still-born when Congress included an amendment to allow federal employees (in counties around Washington, DC where many federal employees lived) to be candidates in partisan local elections as "independent" candidates.

The next year Sen. Hatch poignantly stated the **turmoil of extending coverage to state employees by opening debate with, "Obviously, a great many difficulties were presented by attempting to draft legislation affecting ... State employees...[it] gave rise to a complicated situation**." CR, p. 2338 (1940). Debate went for five months and filled more than 200 pages in the *Congressional Record*. They debated **states *versus* federal rights**, campaign funding limits, objections to the Civil Service Commission making its own rules, and continual confusion over which state employees to cover. The Civil Service Commission became the OSC and MSPB. There was no committee report to explain the bill, and few spoke on how state employees would be covered. Congress agreed that withholding funds from future **loans and grants** was the best way the federal government could force states to punish employees who violated the Act. Withholding occurred if a state did not remove an employee after the Civil Service Commission issued its decision, or if the state or any agency hired that former state employee during eighteen months after removal.

Sen. Hatch's "many difficulties" and "complicated situation" thwarted Congress for many years. While efforts lowered restrictions on federal employees, some other attempts failed to clarify the Act's coverage criteria for state employees. Conservative Sen. Stennis spoke of "complex and intricate" problems, and liberal Sen. Humphrey attacked

the Act as "just confusion confounded and compounded." CR, pp. 8637, 8643 (1950).

In 1974 Congress amended §1502 to limit only state employee partisan candidacy and coercion. States could allow employees to participate in campaigns and be non-partisan candidates. Then Michigan and other states enacted regulations to allow partisan candidacy if the employee took a mandated 60-day unpaid leave of absence. MI Civil Service Rule 1.5-10 stated, "Political activities including candidacy for public office permitted by this rule may be prohibited by preempting federal law," but ignored the Act and notice of penalties. Other Rule 1.5 items "prohibited" soliciting contributions and political activity that conflicted with an employee's satisfactory work performance.

In 1950 Congress amended the Act by adjusting the federal employee penalty from just dismissal to include an unpaid suspension for no less than 90 days. CR, p. 12078 (1950). In 1962 Congress reduced the suspension to no less than 30 days. Further congressional reforms were vetoed by Pres. Ford and Pres. Bush. The 1993 US House of Representatives allowed federal employees to participate in partisan campaigns, similar to the 1974 state employee reforms. An amendment to allow partisan candidacy for federal employees while on 60-day unpaid leave was supported by 57 Senators, more than a majority, but failed to receive the needed 60 votes to end debate. It was cut from the successful bill. (Senate Report on Hatch Act Reform Amendments of 1993, No. 103-57, June 16, 1993). During reform of federal employee coverage there was little effort to lessen state employees penalties.

D. Supreme Court Has Yet to Address as Constitutional the State Employee Penalty for Violation of the Act by Partisan Candidacy.

The US Supreme Court has not ruled on or considered the "removal for 18 months" penalty for state and local employees who violate the Hatch Act. Despite MSPB's frequent disclaimer in decisions affecting state employees that

> "as an administrative agency, the Board has no authority to adjudicate the constitutionality of a statute, [the Board emphasizes that the] **Supreme Court has consistently upheld the constitutionality of the Hatch Act**. See e.g., Broadrick v Oklahoma, 413 U.S. 601 (1973); Oklahoma v US Civil Service Commission, 330 U.S. 127, 142-144 (1947); United Public Workers v. Mitchell, 330 U.S. 75, 93-102 (1947); US Civil Service Comm v. National Association of Letter Carriers, 413 U.S. 548, 568-71 (1973)."

MSPB stated, "sturdy and consistent precedent establishes the validity of this law." (Williams, 1993) Yet, while these "Big Four" Supreme Court rulings affirm as constitutional the federal government's ability to regulate employee political activity, many other aspects of the rulings are not as "sturdy or consistent" as MSPB has asserted.

Congress has eliminated limitations on public employees' political activity that were declared "constitutional" by three of the "Big Four" rulings. The Letter Carriers can now participate in political campaigns. In Mitchell, Mr. Poole can now participate in partisan activity away from his US Mint work site. Mr. Paris is no longer limited by Oklahoma from being Chair of the Dem. Central Committee. Broadrick affirms the federal government's ability to withhold funds from a state for not removing a violating employee, but Broadrick did not rule on the constitutionality of the penalty being only "removal for 18 months" with no lesser penalty.

Recent Court of Appeals decisions show that the Act's state employee coverage is unsturdy and inconsistent. In Biller and Sombrotto v. US MSPB, 863 F.2d 1079 (2nd Cir. 1988), and Blaylock v. MSPB, 851 F.2d 1348 (11th Cir. 1988), the Courts found the national union presidents did not violate the Act by writing pro-Democratic articles. The Courts decided the cases on less than constitutional issues, and did not "reach or decide petitioner's First Amendment arguments." Yet, each Court criticized aspects of MSPB's handling of its responsibilities. The Court stated in Biller (p. 1087) that "because of this inconsistency (in MSPB's prohibiting different actions), we are unable to derive....a rule that comfortably addresses this case." In Blaylock (p. 1357)

> application of the..Act to Blaylock's activities..**implicates the most delicate question involving the First Amendment**...the government's attempt to defend its personnel actions against Blaylock under the justification of government efficiency (when Blaylock had been on unpaid leave for more than a decade) **suggest grave constitutional difficulties**.

Petitioner's challenge to different penalties for federal and state employees was not addressed when the District Court rejected the Equal Protection claim by Camillieri and Winkleman, by restating the Broadrick differentiation between classified and un-classified workers. But the Court alluded "to federalism concerns..the restrictions placed upon states in removing employees from their positions by our developing constitutional law." State of Conn., DHR v US MSPB, 718 F. Supp. 125 (D.Conn. 1989).

Petitioner requests this Court to find that the differences between the penalties for state and federal employees are unconstitutional on their face and in their application, and to suggest that Congress correct the Act to eliminate the differences in the penalties.

II. **Why Petitioner State Employee's right to Due Process was violated by the MSPB's refusal to recognize the sanctity of Michigan's civil service mandated leave for partisan candidacy.**

MSPB's has arbitrarily and capriciously denied a state employee's due process rights to partisan candidacy while on mandated unpaid leave. The State of Minn., Dept. of Jobs & Training v. MSPB, 875 F.2d 179 (8th Cir. 1989), decision erroneously established MSPB's misassertion against leaves of absence. The Court's flawed decision repeated MSPB's misassertion that because "Congress specifically considered and rejected a provision which would have exempted from the Act's prohibitions those candidates who had taken a leave of absence without pay," Congress prohibited all leaves of absence. Many amendments are offered and defeated during debate. The final Act was silent on leave of absences.

MSPB misstated that "the intent of the statute was to prohibit partisan candidacy by any covered employee who had not **resigned** his or her employment. See 86 Cong. Rec. 9447 (1940)." The only resignation statement was in Sec. 17 on page 9447 that affected employees who were candidates "nominated before the enactment of this act" and if they won their election, they must resign their state office or employment. There was **no congressional** statement upon which OSC's Ms. Weintraub mistakenly told Petitioner in April 1992 that he had to resign to run for state representative and he could not avoid the Act by being on "extended layoff" or "unpaid leave of absence."

III. WHY *CERTIORARI* SHOULD BE GRANTED

General considerations for this Court in deciding to grant or to deny the Writ of *Certiorari* are whether the decision of the circuit court appealed from conflicts with

decisions of other circuit courts of appeals, whether there is a federal constitutional provision that is infringed by a federal statute or by the statute's application by a federal agency, and whether this Court should give a definitive interpretation to a federal statute in its supervisory authority over the lower federal courts and administrative agencies. All of these considerations are present in this case.

A. Conflict between the Sixth and the Fifth and Tenth Circuits

The 6th Circuit opinion affirmed the district court's denial of Alexander's request for a plenary hearing on his administrative appeal as mandated by Olenhouse v. Commodity Credit Corp, 43 F.3d 1560, 1578-80 (10th Cir. 1994). There, the 10th Circuit disallowed the use of summary judgment procedures in appeals from agency decisions under the Administrative Procedures Act, even when framed as a motion to affirm, because it invites improper consideration of evidence outside the administrative record and reliance upon post hoc rationalizations for the agency's action.

Recognizing that the 6th Circuit has not previously discussed Olenhouse, Senior Circuit Judge Guy's opinion declined to decide whether to follow the 10th Circuit's lead in regard to Alexander's demand for an Olenhouse hearing. Ruling that the district court applied the proper standard of review, the Court of Appeals for the 6th Circuit totally overlooked Alexander's assertion that, given the deplorable and incomplete state of the record as it was maintained and then transmitted to the district court and to Petitioner by the Merit Systems Protection Board, there was uncertainty as to whether the full record was transmitted to the district court for its review of the case. An Olenhouse hearing, if granted, could have cleared up the status of the record, *inter alia*, but the district court declined to convene such a hearing.

It is important for the lower federal courts to have this Court's definitive guidance as to whether or not, under the Administrative Procedures Act, summary judgment procedures in appeals from agency decisions, even when framed as a motion to affirm, may be used by a district court, as Olenhouse says cannot be done --- but which was done, and the 6th Circuit said could be done, in Alexander's case.

The 5th Circuit has allowed a district court to rule on an administrative appeal through a summary judgment motion. Girling Health Care, Inc. v Shalala, 85 F.3d 211, 214 (5th Cir. 1996).

B. Unique Equal Protection Issue Implicated in Structure and Application of Hatch Act Penalty Provisions

As far as Petitioner can determine, this is the first case to present to a federal appeals court and to this Court the critical question, with extensive proof, of whether the Hatch Act's penalty provisions as applied to state employees violate equal protection because different and less stringent penalties can and almost uniformly have been applied to federal employees for the same prohibited acts over the last 15 years. The 6th Circuit recognized the differences in penalties imposed upon federal and state employees under the Hatch Act. However, the appeals court rejected the Petitioner's arguments that the penalty provisions unfairly discriminate against state employees vis a' vis federal employees and lack a rational basis, and the circuit court dismissed the plain import of the Petitioner's chart (App. E at A 58), which clearly demonstrates that the Merit Systems Protection Board has more harshly penalized state employees than federal employees in situations involving identical prohibited acts.

The MSPB has penalized 37 state and federal employees for partisan candidacy since 1984, when the MSPB started to see cases involving state employees who were candidates while on state civil service mandated unpaid leave to campaign. Of the 25 state employee/ candidates MSPB ordered removal for 23, and the other 2 retired before MSPB ordered removal. MSPB has penalized 12 federal employee/candidates, but **only 3 were ordered removed-** Dominguez, Carney, and Johnson. Bradford and Reckard retired prior to removal. Further, other federal employee/candidates received far less severe penalties even though their violations were more serious. Baker, Campbell, and Edenfeld violated the Act, **OSC formally warned** them of their violations and to stop (Baker) or to not run again (Campbell and Edenfeld). All ignored OSC's formal warnings and violated the Act again. **MSPB's weak suspensions were 30 days for Campbell and Edenfield and 90 days for Baker**! Other federal employee/ candidates, Walker, Andrezjwski, Majure, and Seastrunk were not warned, but were suspended only 30-45 days. Such differences are unconstitutional. (App. E at A 58)

The MSPB claimed how federal employees were more severely penalized due to 1. a federal employee who was removed would never be able to return to that employee's former position, and 2. other federal employees who violated the Act, but not seriously enough for removal, had to suffer a penalty of 30-90 suspension without pay. MSPB claimed state employees suffered lesser penalties, because even if the MSPB ordered removal, the state could retain the employee and suffer the loss of 2 times the employee's annual salary. The federal district court and then the 6th Circuit agreed with the Board's contention, even though the actual punishments were so vastly different in fact.

C. **This Court should give a definitive interpretation to a federal statute in its supervisory authority over the lower federal courts and administrative agencies**

1. **Recent MSPB decisions, DeMeo, Malone, and Reckard, vastly accentuate the Unique Equal Protection Issue Implicated in the Structure and Application of the Hatch Act's Penalty Provisions**

In DeMeo, 77 M.S.P.R. 158 (1997), the MSPB stated through a tortured eighteen page explanation that the original federal employee "removal" penalty language, which had remained the same since 1939 and included future "debarment" from the position the employee was removed from, would now be interpreted by MSPB as a far less severe penalty of "removal only" with no debarment. The DeMeo decision clearly stated,

> The Hatch Act itself **specifies** the permissible penalties for its violation. **Specifically**, 5 U.S.C. § 7326 provides:
>
> An employee or individual who violates section 7323 or 7324 of this title ***shall be removed from his position, and funds appropriated for the position from which removed thereafter may not be used to pay the employee or individual.*** However, if the Merit Systems Protection Board finds by a unanimous vote that the violation does not warrant removal, a penalty of not less than 30 days suspension without pay shall be imposed by direction of the Board. [Emphasis added.] (p. 160)

Then the decision focused on the word "and" between the "removal" provision and the "funds appropriated" provision, and even quoted Sutherland Statutory Construction, **but ignored the key "for the position from which removed" provision and the even more critical "thereafter may not**

be used to pay" provision. By mistakenly focusing on the "funds appropriated" provision instead of the "thereafter may not be used to pay" provision, the MSPB then made its second mistake by stating,

> We find that this statutory prohibition against the payment of appropriated funds is ambiguous on its face, and is susceptible of several plausible interpretations. *(Ibid.)*

Due to misfocusing on the "funds appropriated" provision, the MSPB made its third mistake when it found "there is no binding or persuasive legal precedent resolving this issue," instead of concentrating on the "thereafter" provision for which there is binding and persuasive legal precedent. (p. 161) MSPB made its fourth mistake when it justified its pro-federal employee bias, as challenged throughout this six year case by Petitioner, that federal employees should not be debarred with its statement that **"the Board's long-standing practice has been to construe the penalty provision as simply providing for removal and not debarment."** *(Ibid.)* The MSPB in its fifth mistake confused the Board's **ignoring** of the clear debarment mandate in the statute with its convoluted logic that the Board "had a long continued administrative **interpretation**" that did not insist on debarment with removal.

MSPB made its sixth misstatement in DeMeo that "Congress has not 'corrected' the Board's long standing interpretation, thus tending to show that Congress is satisfied with the Board's interpretation." The truth was that Congress from 1939-1997 was comfortable with its debarment language, and was unaware of MSPB's misunderstanding as asserted in DeMeo that debarment was not a part of the removal penalty. The continued "congressional intent" was verified in later DeMeo decision statements:

> During the (1950) congressional debates, it was stated that the preexisting penalty required violators

to be 'summarily removed from office, and [that] there [was] no law which will permit them to be reinstated under any circumstance'.... (p. 167)

When the Hatch Act was amended in 1962 to lessen the minimum penalty from a 90-day suspension to a 30-day suspension, the 'restriction against reemployment' language remained intact. (p. 168)

(in 1993) ...both of these amendments which would have explicitly provided for different types of debarments were rejected, and the penalty language including the phrase 'funds appropriated for the position from which removed' was left intact. (p. 170)

The MSPB again erred in DeMeo when it tried to use federal court decisions and Attorney Generals' statements to verify its 1997 contention that removal did not include debarment. MSPB insisted that debarment was not a penalty because many of the court decisions and Attorney Generals' statements it listed did not mention debarment as part of the removal penalty. Amazingly, MSPB ignored the debarment language that MSPB also listed in its DeMeo decision from the Supreme Court decisions United Public Workers of America v. Mitchell and U.S. Civil Service Commission v. National Association of Letter Carriers and the 1940 and 1947 Attorney Generals' statements. The conclusion in DeMeo added another misstatement:

Based on the absence of clear legislative intent that debarment was intended, consideration of related statutory provisions, consideration of long-standing construction by this Board and by OPM, consideration of the rules of statutory construction, and for other reasons discussed above, we hold that 5 U.S.C. § 7326 does not authorize us to impose a debarment from federal government employment for violations of the Hatch Act. Rather, we interpret

> section 7326 as simply mandating the removal of the employee from the payroll concurrent with his or her removal from the position. (pp. 174-175)

By MSPB's recent change, the most severe penalty for a federal employee, removal, only means the employee ends employment in his or her present job position with no debarment, and the employee can be hired in a different federal job the next day if management so chooses! MSPB in its Malone (77 M.S.P.R. 477 1998) and Reckard (77 M.S.P.R. 651 1998) decisions reaffirmed that "debarment" was not a part of the removal penalty for federal employees.

2. MSPB in DeMeo did not lessen the far more severe debarment penalty for state employees who violate the same provisions of the Act

The DeMeo decision meekly explained that in

> extending the Hatch Act to State and local employees in 1940, Congress provided that an employee who has been removed for violation on the Act shall not "subsequently (within a period of eighteen months) be [ ] appointed to any office or employment in any State or local agency in such State..." (p. 167)

The MSPB's quote of 5 U.S.C. § 1506(a) ended without stating that the debarment applied to all state or local agencies, **even if the agency received no federal funds**. Further, prior MSPB decisions have extended the debarment to prohibit employment in federal agencies in the state and in non-state or local organizations that receive federal funds. MSPB assumed no federal agency would hire a state employee who had been removed, although that restriction was not written in a MSPB decision. In addition, **Petitioner and many other state employees have been penalized even more severely by their state govern-**

ments, as he was when his department permanently terminated him from employment in that department.

MSPB's rationalization in its DeMeo decision, that a "removed" federal employee is not subject to debarment in that position, also clearly validates Petitioner's constitutional challenge to MSPB's more severe penalties for state employees as demonstrated below in three crucial MSPB's quotations from Sutherland Statutory Construction (5th Edition 1992) in the DeMeo decision (pp. 161-162):

> ...we are particularly mindful that debarment is a penalty, and a severe one. It is well-settled that, when a statute imposes penalties, "it must do so in clear terms to avoid unfairness [and] arbitrary enforcement.." Sutherland Stat. Const. § 59.01.
>
> "It has been held that judicial constructions not construing statutes in favor of the offender violate due process." *Id.*, § 59.03. "
>
> As the Supreme Court has observed, a permanent debarment from federal employment is "punishment...of a most severe type," which Congress invoked only for "special types of odious and dangerous crimes." United States v. Lovett, 328 U.S. 303, 316, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252 (1946).

Petitioner vigorously asserts that the MSPB's statements fully apply to his challenge of the more severe penalties on state employees. Further, DeMeo undermines the District Court's assertion at 12 that:

> [His] constitutional challenge is essentially that state employees are penalized more harshly for their activities in violation of the Hatch Act. However, the statute can easily be read doing just the opposite.

DeMeo also undermines two Court of Appeals assertions:

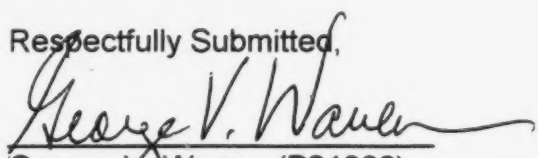
> Thus, the penalties which may be imposed on a state employee for violations of the Hatch Act are more severe in some situations and less severe in other situations than the penalties for federal employees. (App. A at A 18)
>
> ...because the question of whether a particular violation warrants removal is made on a case-by-case basis, the differences in circumstances from case-to-case provides a rational basis for differences in outcomes. (App. A at A 20)

With DeMeo **a** federal employee will suffer only an unpaid leave for 30-90 days or has to find a new federal job, even repeat violators of the Act - Baker, Campbell and Edenfield, versus **all 33** MSPB state decisions since 1984 resulting in 33 **serious** penalties: removals for at least 18 months, retirements, or states losing two years of salary. Thus, the DeMeo decision to eliminate debarment as a part of the federal removal penalty makes the differences in penalties even more unconstitutional, and further necessitates the attention of this Court to exercise its supervisory authority over the lower federal courts and administrative agencies.

IV. CONCLUSION

WHEREFORE, Petitioner requests that this Court issue its writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit to review the decision of that Court in Petitioner's case.

Respectfully Submitted,



George V. Warren (P21996)
Counsel of Record
847 W. Willow, Nandy House
Lansing, Michigan 48906
(517) 484-5050

EXHIBITS BY PETITIONER

A. UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT D. ALEXANDER,
Plaintiff-Appellant,

v.

MERIT SYSTEMS PROTECTION BOARD,
Defendant-Appellee.

No. 97-2131

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids
No. 96-00180--Wendell A. Miles, District Judge.

Argued: October 29, 1998

Decided and Filed: January 21, 1999

Before: GUY, CLAY, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: George V. Warren, Lansing, Michigan, for Appellant. Eric D. Flores, U.S. Merit Systems Protection Board, Washington, D.C. for Appellee.
ON BRIEF: George V. Warren, Lansing, Michigan, for **p. 2** Appellant. Eric D. Flores, U.S. Merit Systems Protection Board, Washington, D.C. for Appellee.

OPINION

RALPH B. GUY, JR., Circuit Judge. Plaintiff Robert Alexander, appeals the district court's decision affirming the order of the Merit Systems Protection Board (Board) that he be removed from his employment with the State of Michigan for violation of the Hatch Political Activity Act (Hatch Act), 5 U.S.C. § 1502(a)(3). The Board found plaintiff violated the Hatch Act by being a candidate in a partisan election while principally employed with the Michigan Department of Social Services (DSS) in the Medicaid Program. 1 On appeal, Alexander argues that the district court failed to properly determine whether the Board's decision was in accordance with law and not an abuse of discretion. Alexander also argues that his due process rights were violated because the Hatch Act does not adequately define who is covered, does not exempt employees who take an unpaid leave of absence, and does not define the penalty of removal. 2 Finally, Alexander claims he was denied equal protection because the Hatch Act imposes more severe penalties on state employees than federal employees. After careful review of the entire record and the arguments on appeal, we affirm.

---

1 In his complaint for review of the Board's decision, plaintiff named both the Board and the Office of Special Counsel (OSC) as defendants. The district court granted the OSC's motion to dismiss and the OSC was voluntarily dismissed from this appeal.

2 Although Alexander invokes due process protections, he has not made any attempt to demonstrate a distinct constitutional due process claim. As a result, we have treated these claims on appeal as challenging whether the Board's decision was in accordance with the law.

I.

Alexander was employed as a Departmental Analyst with the Michigan DSS, first in the Energy Services Division and then in the Medical Services Administration. The parties stipulated that (1) the DSS is an executive agency of the State of Michigan, (2) when plaintiff declared his candidacy in May 1992 he was acting as a project officer for the Medicaid Program, and (3) the Medicaid Program is 50 percent funded by reimbursement from the United States Department of Health and Human Services.

In March 1992, Alexander learned that the democratic State Representative for the 53rd District would not run for re-election and considered becoming a candidate. Plaintiff had prior experience with partisan politics and was familiar with the Hatch Act. He knew that the Act prohibited covered state employees from becoming candidates in partisan elections, but questioned whether he was a covered employee. The Act defines a covered employee as an individual employed by a state or local agency "whose principal employment is in connection with an activity which is financed in whole or part by *loans or grants* made by the United States or a Federal agency," 5 U.S.C. § 1501(1) (emphasis added). Federal medicaid funding was universally referred to as a "reimbursement" with the DSS. Alexander reasoned that if the reimbursements were not loans or grants, he would not be a covered employee and, therefore, the Hatch Act would not prohibit him from participating in the election.

Although Alexander inquired from a number of sources whether a state employee whose position is partially funded by federal reimbursements was covered by the Hatch Act, he was not satisfied with any of the answers he received. Plaintiff's supervisor, Ed Kemp, thought Alexander was covered by the Act and suggested he call Human Resources. On April 9, 1992, Alexander contacted Paul Servais of the DSS's Office of Human Resources, who told him he was covered by the Hatch Act and could not run in a

partisan **p. 4** election. Alexander also called the Michigan Department of Civil Service for information on both the Hatch Act and the state civil service requirement that he take a 60-day unpaid leave of absence to run for office. He received a copy of a discussion paper addressing the Hatch Act, which did not mention reimbursements, but commented that the Act had 3,000 confusing contradictory rules.

In late April 1992, Plaintiff again specifically asked Servais whether a "reimbursed" employee was covered by the Hatch Act. Although Servais said he was covered, Alexander was not satisfied by this response because Servais could not provide a written explanation verifying his opinion. With that, Servais suggested that Alexander call Heidi Weintraub, who was his contact at the Office of Special Counsel (OSC) in Washington, D.C. Although he did not have any prior contact with Servais in particular, Alexander distrusted Human Resources generally because he had successfully grieved an earlier demotion on the grounds that Human Resources had failed to follow the proper procedures.

Alexander called Weintraub, not knowing that the OSC prosecuted violations of the Hatch Act, 3 and identified himself as an employee of Michigan's Medicaid Program. Weintraub responded that he was covered by the Act and would have to resign to run in the primary. When Alexander questioned whether medicaid "reimbursements" were "loans or grants" for purposes of the Act, Weintraub responded that he was covered and that was all he needed to know. Alexander called Weintraub again several days later (1) to request a citation to verify that medicaid employees are covered by the Act, and (2) to ask if he would still be covered if he took an unpaid leave of absence. Weintraub unequivocally answered that he was covered by the Act, that state-mandated leave policies were irrelevant to the Act, and

---

3 The OSC is responsible for not only giving advice concerning the Hatch Act, but also for investigating and prosecuting alleged violations of the Act.

p. 5 that she did not have to provide him with any citations to verify this information. Weintraub nonetheless offered to send him a booklet to answer his questions.

Alexander received a booklet entitled "Political Activity and the State and Local Employee." Alexander hid not find an answer to his question, although he admitted he did not read all of it. An "important note" on the first page of the booklet warned that ignorance of the law does not excuse a violation of the Hatch Act and explained that an advisory opinion could be requested from the OSC. While the booklet listed "public health" as a program that frequently receives federal funds, it did not specifically list medicaid. 4 Despite the information provided in the booklet concerning the financial penalties that may be imposed on a state employer under the Hatch Act, Alexander assumed DSS would only be penalized in an amount equal to twice his salary for the *one* month before his state-mandated leave of absence began. As a result, he did not believe DSS would remove him from his position if he was found to have violated the Act. Relying on the failure of Servais and Weintraub to verify that he was a covered employee, Alexander concluded that it was uncertain whether the Hatch Act applied to him and decided to "run and take a chance on an unclear situation."

On May 12, 1992, Alexander filed his nominating petition to become a candidate. The next day, Alexander called John Sorbet, a DSS federal funding analyst who had been on vacation, to ask about medicaid funding. Sorbet explained that federal medicaid funding is received in the form of a "quarterly grant award." While this information, received from someone outside Human Resources, indicated that medicaid funding was by grant and, therefore, meant he was a covered employee, Alexander disregarded this information as well. About a week later, Alexander told Servais that he

---

4 Title 42 of the Code of Federal Regulations, containing the medicaid regulations with which Alexander worked so extensively, is entitled "Public Health."

p. 6 had decided to run, explained that he disagreed with Weintraub's opinion, and indicated that the issue might end up in court. Within a few weeks, Servais wrote to the OSC to advise them that Alexander intended to be a candidate in the partisan primary election to be held on August 4, 1992.

On July 23, 1992, OSC investigator Butch Perkins met with Alexander for an hour, explained the Hatch Act to him, and conducted an interview. Alexander complains that Perkins did not offer to "drop" the investigation if he withdrew from the campaign and implies that he would have taken such an offer at that point. Alexander lost the primary a few weeks later and returned to work.

In July 1993, the OSC filed a complaint with the Merit Systems Protection Board alleging that Alexander's candidacy violated the Hatch Act. The Board assigned the case to an administrative law judge (ALJ), who permitted discovery, held hearings, and issued a 72-page recommended decision in July 1995. The ALJ recommended the Board find that Alexander had violated the Hatch Act as alleged, but that the violation did not warrant removal from his position. The ALJ concluded that from May 12 through August 4, 1992, Alexander was a covered employee and had campaigned for partisan political office. While the ALJ found Alexander had acted reasonably and responsibly in trying to determine his coverage under the Act prior to May 12, he nonetheless concluded as follows:

> His continuing to campaign after learning from an independent DSS source that his office was funded by so-called quarterly *grant* awards constituted a knowing assumption of risk that a reasonably prudent person would not have taken and thereby established a knowing and willful violation of the

> Hatch Act. The offense of campaigning for partisan political [office] is a serious offense. Nevertheless, the actions of the Petitioner [the OSC] significantly contributed to Respondent's [Alexander] assumption of **p. 7** the risk and accordingly such assumption ought not be a basis for Respondent's removal.

(Emphasis in original). The OSC filed exceptions to the recommendation, to which Alexander responded.

The Board's final decision and order, issued October 6, 1996, adopted in part and reversed in part the ALJ's recommended decision and found that Alexander's "violation [of the Hatch Act] was of such scope and effect as to warrant removal from his position." Special Counsel v. Alexander, 71 M.S.P.R. 636, 640 (1996). The Board accordingly ordered that the DSS could choose to either remove Alexander from his position, or forfeit receipt of federal funds in an amount equal to two years of his pay. The Board also ordered that federal funds equal to two years' salary would be withheld if Alexander were hired by a state or local agency in the State of Michigan within 18 months after his removal. DSS promptly terminated Alexander's employment.

.....Alexander appealed to the district court and obtained a stay of the Board's decision. As a result, DSS changed his termination to an indefinite suspension without pay. The district court affirmed the decision of the Board for the reasons set forth in its opinion of September 30, 1997. Alexander filed an appeal to this court, and in January 1998 his employment with DSS was finally terminated.

II.

The Merit System Protection Board has plenary jurisdiction under 5 U.S.C. § 1505 to determine after a hearing whether a state or local employee has violated the Hatch Act, and "whether the violation warrants removal of the officer or employee from his office or employment[.]"

"The Board's determination may be reversed only when the reviewing court determines that the Board abused its discretion, or that the decision was not in accordance with the law." Minnesota Dep't of Jobs and Training v. Merit Sys. Protection Bd., 875 F.2d 179, 182 (8th Cir. 1989) (*en banc*) citations omitted).

p. 8 The Hatch Act prohibits a covered state employee from running as a candidate in a partisan election. See Williams v. U.S. M.S.P.B., 55 F.3d 917, 922 (4th Cir. 1995) (partisan candidacy by a covered employee is a per se violation of the Hatch Act"); 5 U.S.C. § 1502(a)(3); 5 U.S.C. § 151.101(f) (1998). Once it is shown that a state employee violated the Act, the only alternatives are removal or no penalty. See Minnesota, 875 F.2d at 182. The question of whether removal is warranted is a matter of administrative discretion. See Oklahoma v. U. S. Civil Service Commission, 330 U.S. 127, 142-144 (1947); Jarvis v. U. S. Civil Service Commission, 382 F.2d 339, 342-43 (6th Cir. 1967); 5 U.S.C. § 1508.

In reviewing the district court's order, we must make an independent decision from the administrative record employing the same standard of review as the district court. See Minnesota, 875 F.2d at 182. "As long as there was a reasonable basis for the Board's conclusion that removal was warranted, the district court was required to defer to that conclusion as being within the discretion of the Board. Only if the Board's conclusion had no reasonable basis would it constitute an abuse of discretion." *Id*.

Alexander does not directly contest the Board's factual finding that he was a covered employee under the Hatch Act or that he violated the Act by becoming a candidate in a partisan election. In fact, he asks that we adopt the ALJ's recommendation. Alexander challenges the district court's decision, raises several arguments concerning the application of the Hatch Act, and argues that the Board abused its discretion in ordering that he be removed from employment with the State of Michigan.

A. Olenhouse Motion

Alexander challenges the district court's decision on the grounds that it was improper to decide the case from the Board's motion to affirm, relying upon Olenhouse v. **P. 9** Commodity Credit Corp., 42 F. 3d 1560 (10th Cir. 1994). In Olenhouse, the Tenth Circuit disallowed the use of summary judgment procedures in appeals from agency decisions under the Administrative Procedures Act, even when framed as a motion to affirm, because it invites improper consideration of evidence outside the administrative record and reliance upon post hoc rationalizations for the agency's action. While we have not previously discussed Olenhouse, we need not decide whether to follow the Tenth Circuit's lead in this regard. We are certainly similarly concerned that district courts apply the proper standard of review and avoid consideration of evidence outside the administrative record. In this case, we find no error.

The Board filed a motion to affirm that did not rely upon summary judgment standards or offer new evidence, and the district court recognized and applied the appropriate standard for reviewing the Board's final decision and order. This is all that was required of the district court. See Baca v. King, 92 F.3d 1031, 1034 n. 1 (10th Cir. 1996) (no error where proper standard of review applied in administrative action; Girling Health Care, Inc. v Shalala, 85 F.3d 211, 214 (5th Cir. 1996) (Olenhouse distinguishable and inapplicable where agency relies solely upon administrative record). Besides, even in Olenhouse, the Tenth Circuit chose to conduct the appropriate review itself, rather than remanding the case for further proceedings. See Olenhouse, 42 F.3d at 1580. 5

5 Alexander argues that the district court reiterated errors and misstatements by the Board, even though he had identified "102 errors, misstatements, and omissions" in the Board's decision. After reviewing the claimed errors, we note that Plaintiff's exceptions to the Board's decision do not represent factual errors, but

largely reflect his disagreement with the conclusions of the Board, his objections to the references to medicaid being a "federally-funded" program, and his own argumentative characterization of the record. Alexander also argues that the district court's discussion of his equal protection claims misapprehends the impact of the Board's decision upon him. It is clear that his quarrel in this regard is with the court's legal conclusions. We have reviewed the ALJ's recommendation, the Board's decision, and the district court's [footnote continues on p. 10] opinion. Although we do not find material errors, misstatements or omissions in the facts, we nonetheless make an independent review of the administrative record.

p. 10 **B. "Loans or Grants"**

Alexander argues that the Hatch Act fails to adequately define which state employees are covered. The Act provides in pertinent part that:

> "State or local officer or employee" means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency... (5 U.S.C. §1501(4))

Alexander claims that the Act fails to define "loans or grants" and, as a result, he was unsure whether the federal funds that financed Michigan's Medicaid Program came within the definition since they were universally referred to as "reimbursements." There can be no question, however, that Alexander was a state employee covered by the Hatch Act because he was principally employed in connection with the Medicaid Program, which is 50 percent financed by grants from a federal agency.

In fact, Alexander conceded before the ALJ that the Medicaid Program was funded by federal grants. Alexander testified that he had recently been told by a federal Health Care Financing Administration (HCFA) employee that the

first word of the Social Security Act provisions relating to Medicaid is "grants." See 42 U.S.C., Subchapter XIX -- Grants to State for Medical Assistance Programs. Likewise, the federal regulations under 42 C.F.R., Sub-chapter C, Part 430 -- Grants to State for Medical Assistance Programs, set forth the following program description in the first section: "Title XIX of the Social Security Act, enacted in 1965, authorizes *Federal grants* to the States for medical assistance..." 42 C.F.R. § 430.0 (1998) (emphasis added). Also, not much **p. 11** further into the regulations, a section entitled "Grants procedures" begins: "Once HCFA has approved a State [medicaid] plan, it makes *quarterly grant awards* to the State to cover the Federal share of expenditures for services, training, and administration." 42 C.F.R. §430.30(a)(1) (1998) (emphasis added).

Alexander seems to argue that he did not have reason to *know* he was a covered employee, which would be relevant to the question of whether removal was warranted. Alexander testified that he felt uncertain whether he was a covered state employee and decided to "take a chance on an unclear situation." While it is true Alexander made an effort to find out if he was covered by the Act, he proceeded to completely disregard the uncontradicted and unequivocal warnings that he was a covered employee prohibited from running for state representative. In fact, no one told Alexander that he was not covered by the Hatch Act. Moreover, Alexander learned from Sorbet the day after he filed his nominating petition that the federal portion of medicaid was paid by quarterly grant *awards*. Finally, despite his professed familiarity with a large portion of the federal medicaid regulations and his practice of citing to regulations in connection with his work, Alexander did not examine the regulations himself. 6

C. Civil Service Leave of Absence

Alexander claims that the Board should be required to recognize his mandatory unpaid leave of absence as an exception to coverage under the Hatch Act. Acknowledging

that the court in Minnesota Department of Jobs & Training v M.S.P.B., 875 F.2d 179, 183 (8th Cir. 1989), specifically held that the Hatch Act applies without regard for an employee's leave status, Alexander

---

6 Alexander continues to argue that federal reimbursements are not "loans or grants" for purposes of the Hatch Act. We need not discuss this issue, however, because Alexander concedes he was specifically told that medicaid is funded by 'quarterly grant awards."

p. 12 argues that the case was wrongly decided. We disagree. The Eighth Circuit explained that

> the legislative history of the provisions of the Act makes it unmistakably clear that covered state employees are subject to the prohibitions of the Act regardless of leave status. During hearings on a proposal to extend the Hatch Act to state and local government employees, Congress specifically considered and rejected a provision which would have exempted from the Hatch Act's prohibitions those candidates who had taken a leave of absence without pay. 86 Cong. Rec. 2872-75 (1940). *Id.*

Further, Alexander's reliance upon the dissent in Minnesota is misplaced. Thomas Kehoe, the plaintiff in that case, was aware of and relied upon the federal district court decision in Johnson v. Cushing, 483 F. Supp. 608 (D. Minn. 1980), and action brought under 42 U.S.C. §1983 in which the court held the Hatch Act did not apply to a state employee on leave of absence. Alexander fails to recognize that the dissenters in Minnesota agreed with the majority that Johnson was wrongly decided, and only took issue with the conclusion that Kehoe could not have reasonably relied upon the Johnson decision. Of course, Alexander has a much weaker argument than Kehoe, because Alexander did not claim to have relied upon Johnson, or any federal district court decision for his claim that he was not covered by the Hatch Act. In fact, no one ever **p. 13** told Alexander that he could run for office without violating the Hatch Act. 7

D. Removal Penalty

Plaintiff makes the novel argument that the penalty of removal for state employees is vague and should be interpreted to be the same as a suspension. This argument is without merit. The penalty provision in 5 U.S.C. § 1506(a) clearly gives the employer the choice of removing the employee in question "from his office or employment," or forfeiting federal funds equal to two years' pay at the rate or amount the employee was receiving at the time of the violation. Further, for 18 months *after his removal* from employment, federal funds also will be forfeited if the employee is appointed to an office or employment with a state or local agency within the same state. *Id.* While Alexander is correct that the threat of financial penalty is lifted after 18 months, this only means that after a separation of 18 months a state or local agency could hire him without forfeiting federal funds. This is clearly not the equivalent of an 18-month suspension without pay. Alexander's contention is further undermined by the fact that Congress included suspension without pay as a penalty for federal employees who violate the Act, but whose violations do not warrant removal. *See* 5 U.S.C. § 7326.

---

7 Alexander cites two cases to support his contention that the Hatch Act does not preclude political activity while on leave of absence. See Biller v US MSPB [863 F.2d 1079 (2nd Cir. 1988)]; Blaylock v. MSPB [851 F.2d 1348 (11th Cir. 1988)]. In Biller and Blaylock, the plaintiffs were federal employees who took a leave of absence to work for a union. They wrote articles that criticized President Reagan and supported the candidacy of Walter Mondale. In both cases, the courts found that the activity did not violate the Hatch Act because the plaintiffs did not take active part in a political campaign. Finding no violation of the Act, the First Amendment constitutional claims were not addressed. Neither case, however, was decided on the grounds that these employees were on leave of absence.

p. 14 **E. Abuse of Discretion**

Alexander maintains that the Board abused its discretion in finding that removal was warranted for his violation of the Hatch Act and urges that we adopt the ALJ's recommended decision. The question of whether removal is warranted is a matter of administrative discretion. See Oklahoma v. U. S. Civil Service Commission, 330 U.S. 127, 146 (1947). Whether removal is appropriate depends upon the seriousness of the violation, taking into account all relevant mitigating and aggravating factors. See Williams v. U.S. M.S.P.B., 55 F.3d 917, 922 (4th Cir. 1995). Those factors include: (1) the nature of the offense and the extent of the employee's participation; (2) the employee's motive and intent; (3) whether the employee received the advice of counsel regarding the activities at issue; (4) whether the employee ceased the activities at issue; (5) the employee's past employment record; and (6) the political coloring of the employee's activities. See Special Counsel v. Purnell, 37 M.S.P.R. 184, 200 (1988), *aff'd sub nom.* Fela v. Merit Sys. Protection Bd., 730 F. Supp. 779 (N.D. Ohio 1989). We must determine from a review of the adminis-trative record whether there is a reasonable basis for the Board's decision that removal was warranted. See Minnesota, 875 F.2d at 182. We find that there was more than a reasonable basis for the Board to find that Alexander's violation of the Hatch Act warranted his removal.

As the Board noted, candidacy in a partisan political election is a substantial and conspicuous violation of the Hatch Act, which has clear political coloring. See Alexander, 71 M.S.P.R. at 647-48. See also Special Counsel v. Brondyk, 42 M.S.P.R. 333, 337 (1989). Alexander was familiar with the Act and knew that if he was a covered state employee, he would be prohibited from running in the primary. Alexander disregarded the repeated warnings from Kemp, Servais, and Weintraub, that he was covered by the Hatch Act and was never advised to the contrary. Instead, Alexander relied on the distinction he

saw between reimbursements and grants **p. 15** without determining whether such a distinction was supported by the medicaid statute or regulations. Unsatisfied by Weintraub's answers and refusal to provide him with verification, Alexander concluded that the question of whether he was a covered employee was "uncertain" and decided to take a chance that he would be in violation of the Act. Further, Alexander admitted that he was told the day after he filed his nominating petitions that medicaid is funded by federal grant awards, but continued to run. We conclude that the record more than supports a finding that Alexander willfully violated the Act.

The Board also had a reasonable basis for rejecting the ALJ's conclusions concerning the reasonableness of Alexander's decision to disregard the warnings of Weintraub and Servais. We agree with the Board that Alexander understood but disagreed with Weintraub's advice and chose to disregard it. Nor was Alexander's conduct justified by the failure of Weintraub to provide him with a citation to prove he was covered or explain to is satisfaction why she believed he was covered by the Act. Likewise, we agree with the Board's statement the "we cannot sanction a public employee's disregard of the advice of his agency's personnel office and his superior merely because he had successfully challenged a personnel action in the past." Alexander, 71 M.S.P.R. at 649.

Thus, we find the Board's conclusion that Alexander violated the Hatch Act was in accordance with the law, and the determination that his violation warranted removal was not an abuse of discretion.

III.

Alexander argues that his constitutional right to equal protection was violated because the Hatch Act imposes more severe penalties on state employees than federal employees both in the penalty provisions set out in the

Hatch Act and as applied by the Merit Systems Protection Board. That there **p. 16** are differences in the treatment of federal and state employees, however, does not in and of itself establish an equal protection violation. 8 Nor are equal protection guarantees "a license for courts to judge the wisdom, fairness, or logic of legislative choices." FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).'" The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think the political branch has acted.'" *Id.* at 314 (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979) (footnote omitted). ..

The differences in the Hatch Act's treatment of federal and covered state or local agency employees clearly do not involve classifications, either facially or as applied, along "suspect" lines. Further, although Alexander has repeatedly raised the specter of the First Amendment in this case, the Supreme Court has never recognized a fundamental right to express one's political views by becoming a candidate for office. See Carver v. Dennis, 104 F.3d 847, 850-51 (6th Cir. 1997); Brazil-Breashears v. Bilandic, 53 F.3d 789, 791 (7th Cir. 1995).

If a classification neither involves a suspect or quasi-suspect classification, nor infringes a fundamental constitutional rights, it must be upheld against an equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Beach Communications, 508 U.S. at 313 (citations omitted).

---

8 Plaintiff's reliance upon Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989), is misplaced. While Davis involved a challenge to different tax treatment of federal and state retirees' retirement benefits, the challenge was not based on equal protection, but on a federal statute which preserves federal employees' immunity from discriminatory taxation. See 4 U.S.C. §111.

P. 17 On rational-basis review, a classification bears a strong presumption of validity and "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." Beach Communications, 508 U.S. at 315 (citing Vance, 440 U.S. at 111). The government has "no obligation to produce evidence to sustain the rationality of a statutory classification." Heller v. Doe, 509 U.S. 312, 320 (1993).

Alexander correctly notes that there are differences in the penalties for Hatch Act violations committee by federal employees and those committed by covered state and local agency employees. Alexander specifically complains that the only penalty that may be imposed on a state employee under 5 U.S.C. § 1506 is removal for not less than 18 months, while penalties for federal employees under 5 U.S.C. § 7326 include suspension without pay [for not less than 30 days]. Alexander argues that if an intermediate penalty, such as a suspension, had been available in his case, the Board could have imposed a lesser penalty than removal.

In the case of a covered state employee, the Board must find both that there was a violation and that the violation warrants removal before *any* penalty may be applied. *See 5 U.S.C. § 1505* In contrast, a federal employee who violates the Act "shall be removed" except that when the Board unanimously finds that the violation does not warrant removal, the employee must *still* be suspended without pay. *See 5 U.S.C. § 7326.* Although the Hatch Act does not define when removal is warranted, the Board has applied the same factors to determine whether a violation by a state of federal employee warrants removal. See Special Counsel v. Purnell, 37 M.S.P.R. 184, 200 (1988)(state employees), aff'd sub nom. Fela v. U.S. M.S.P.B., 730 F. Supp. 770 (N.D. Ohio 1989); Special Counsel v. Lee, 58 M.S.P.R. 81, 91 (1993)(federal employee).

In this case, since the Board found Alexander's willful violation warranted removal, the penalty would have been the **p. 18** same even if he had been a federal employee. 9 Moreover, even when the Board finds a state employee's violation warrants removal, his employer may still choose not to remove him if it is willing to forfeit federal funds in an amount equal to two times his annual salary at the time of the violation. *See 5 U.S.C. § 1506.* At the same time, a state or local agency employer cannot circumvent the penalties by moving the employee to another position, because the removal penalty is coupled with an 18-month debarment from employment by any agency in the state that receives federal funds. *Id.* Thus, the penalties which may be imposed on a state employee for violation of the Hatch Act are more severe in some situations and less severe in other situations than the penalties for federal employees.

These are not the only differences in the treatment of federal employees and covered state employees. When first enacted, the Hatch Act regulated only the activities of federal employees. It was not until the following year that Congress extended Hatch Act coverage to those state and local employees principally employed in connection with federally-funded activities. Even a cursory review of the provisions reveals significant differences in the scope of activities that are prohibited by the Hatch Act. In fact, federal employees are prohibited from engaging in a broader range of political activities than covered state employees. Compare 5 U.S.C. §§ 7323, 7324 and 7325 with 5 U.S.C. § 1502(a).

The interests of the federal government in regulating the political activities of its own employees were discussed by the Supreme Court in U. S. Civil Service Commission v.

---

9 It was for this reason that the district court concluded Alexander did not have standing to assert an equal protection challenge. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). While we agree that Alexander could have not have been adversely affected by the omission of suspensions from the

statutory penalties available for violations by covered state employees, we simply conclude that he has failed to demonstrate he was deprived of equal protection.

p. 19 National Association of Letter Carriers, 413 U.S. 548, 568-71 (1973). There, the Court noted that the partisan political activities of federal employees are limited in order that government operate effectively and fairly, without political influence or the appearance of political influence, and that federal employment be based on merit rather than political performance. *Id.* When it comes to regulating the political activities of state employees, however, the federal government does not have the same interest in promoting efficiency or public confidence in state government as a whole but, rather, has an interest in removing partisan political influence from the administration of federal funds. See Oklahoma v. U. S. Civil Service Commission, 330 U.S. 127, 142-144 (1947); Fela v. U.S. M.S.P.B., 730 F. Supp. 770 (N.D. Ohio 1989). While the federal government, acting in its role as an employer, can directly require the removal or suspension of a federal employee, the power of Congress to regulate the actions of covered state and local agency employees is based on its spending power; that is, the ability to withhold federal funds. As such, Congress was required to devise a different penalty scheme for state and local agency employees. In doing so, Congress may have determined that it was necessary to threaten a sufficiently serious penalty, i.e., removal with an 18-month debarment or the payment of a significant financial penalty, in order to secure compliance with the statutory prohibitions for covered state and local agency employees. We find that these are reasonably conceived considerations that could provide a rational basis for the different statutory penalty provisions for federal employees and covered state and local agency employees who violate the Hatch Act.

Alexander also claims that the Hatch Act violates equal protection as applied, because the Board has imposed harsher penalties on state and local employees than federal employees for the same violations of the Act. We disagree.

First, because the question of whether a particular violation warrants removal is made on a case-by-case basis, the differences in circumstances from case-to-case provides a rational basis for differences in outcomes. Second, the **p. 20** alleged disparities are not what plaintiff would have us believe. Relying on his own subjective compilation of Board decisions since 1984, Alexander asserts that while 31 of 33 state or local employees were removed, only 3 of 22 federal employees were removed for the same violations. The cases involving the 22 federal employees, however, included both non-final cases and those alleging conduct that is not prohibited for covered state employees. Of the 12 final cases involving partisan candidacy and fund-raising by federal employees (activities which state employees are also prohibited from engaging in), five were settled by agreement and seven went to decision by the Board. Of these seven, four employees were suspended and three were removed. The three federal employees who were removed were similarly-situated to Alexander in that they also were found to have deliberately violated the prohibition on partisan candidacy. See Special Counsel v. Dominguez, 55 M.S.P.R. 652 (1992) (employer cautioned against running); Special Counsel v. Carney, 31 M.S.P.R. 32 (1986)(warned by employer and OSC); Special Counsel v. Johnson, 26 M.S.P.R. 560 (1985)(warned by OSC).

Finally, to the extent that Alexander's equal protection claim may be understood to complain that the OSC selectively enforced the Hatch Act against him because he was a state employee, we agree with the district court that it is without merit. See Futernick v Sumpter Twp,. 78 F.3d 1051, 1060 (6th Cir. 1996) ("the choice of whom to prosecute or cite for a violation of an otherwise valid law or regulation is constitutionally troublesome only when it is blemished by the intent to harm a protected group or punish a person for the exercise of a constitutionally protected right").

AFFIRMED.

B. Opinion and Order by Federal District Judge, Wendell A. Miles, on September 30, 1997

p. 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT D. ALEXANDER,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD and OFFICE OF SPECIAL COUNSEL,
Respondents.

No. 5:96-CV-180

_____/

OPINION AND ORDER

Petitioner Robert Alexander appeals the decision of the Merit Systems Protection Board ("the Board") that Alexander's violation of the Hatch Political Activity Act ("Hatch Act" or the Act"), 5 U.S.C. §§ 1501 et seq., warranted his removal from employment with the State of Michigan. The matter is currently before the court on a motion to dismiss filed by respondent the Office of Special Counsel, and on a motion to affirm filed by the Board. For the reasons to follow, the court DISMISSES this action as to the Office of Special Counsel, and AFFIRMS the decision of the Board.

FACTS [1]

Since 1986, Robert Alexander has been employed by the State of Michigan as a civil service employee of the Michigan State Department of Social Services ("DSS"). Since May 1992 he has been principally employed as a Departmental Analyst VII in the Institutional Policy Division,

1 The parties filed a Joint Stipulation of Materiel Facts and Issues in the proceeding before the Board. The court's recitation of the facts is derived in large part from that stipulation.

Bureau of Program Policy in DSS' **p. 2** Medical Services Administration. As Departmental Analyst VII, Alexander has acted as a project officer in the state-wide administration of Michigan's Medicaid program, which is 50 percent reimbursed by the United States Department of Health and Human Servais.

On April 9, 1992, Alexander contacted Paul Servais, who served in DSS' Office of Human Resources, and informed Servais that he was considering running for State Representative. Servais informed Alexander that he was covered by the Hatch Act and could not therefore run in a partisan election. Subsequently, when Alexander again contacted Servais about his candidacy, Servais referred Alexander to Heidi Weintraub, an attorney in the Office of Special Counsel ("OSC") 2, as someone to whom Alexander could post his questions regarding the applicability of the Hatch Act.

Before filing his petition to become a candidate for State Representative, Alexander telephoned Weintraub, who informed his that he was covered by the Hatch Act and that he could not run for State Representative and continue to be employed by DSS. Apparently unsatisfied with this response, Alexander subsequently telephoned Weintraub again but -- unfortunately -- received the same response: Alexander was covered by the Hatch Act. Weintraub also informed Alexander that he would still be covered by the Act

2 Pursuant to 5 U.S.C. § 1216, the Office of Special Counsel is authorized to investigate and seek disciplinary action where allegations are raised involving prohibited political activity by State and local employees.

even **p. 3** if he took an unpaid leave of absence from his state position. 3

On May 11, 1992, Alexander filed a nominating petition with the Washtenaw County Clerk to become a candidate on the Democratic ticket for the office of Michigan State Representative, 53rd District. From June 10, 1992, until

August 10, 1992, Alexander took an unpaid leave of absence in order to actively campaign for the Democratic nomination.

The OSC filed a complaint charging Alexander with violating § 1502(a)(3) of the Hatch Act by participating in a partisan election. 4 A hearing was held before an administrative law judge ("ALJ"), who issued a decision recommending the Board determine

---

3 "A review of the legislative history of the provisions of the Act makes is unmistakably clear that covered state employees are subject to the prohibitions of the Act regardless of leave status." Minnesota Department of Jobs & Training v M.S.P.B., 875 F.2d 179, 183 (8th Cir. 1989); see also Brandon v. Southwest Mississippi Senior Serv., Inc., 834 F.2d 536, 537 (5th Cir. 1987) (Under Hatch Act, civil servant status under state law is immaterial; it is sufficient if employee falls within the definition of state or local officer of employee contained in 5 U.S.C. § 1501 (4)).

4 See 5 C.F.R. § 151.101(h) ("'Partisan' when used as an adjective refers to a political party"). Title 5 U.S.C. § 1503 allows State and local employees to participate in an election only if none of the candidates could be considered partisan. Brandon, 834 F.2d at 537.

p. 4 that Alexander violated the Act as alleged, but that the violation did not warrant removal from employment under 5 U.S.C. § 1505. The Board agreed with the ALJ's decision insofar as the ALJ determined that Alexander violated the Act. However, disagreeing with the ALJ regarding the penalty, the Board concluded that Alexander's violation was of such scope and effect to warrant his removal from employment. Alexander filed a petition for review in the court, pursuant to 5 U.S.C. § 1508. This court subsequently stayed the Board's decision pending the outcome of this proceeding.

ANALYSIS

1. Office of Special Counsel's Motion to Dismiss

The OSC argues that it should not have been named by Alexander as a respondent in this action because the decision being reviewed by this court was issued by the Board pursuant to 5 U.S.C. § 1505, and not by the OSC, which merely acted as investigator and prosecutor and submitted evidence and argument to the Board.

The court concludes that the OSC is not properly a party to this action. In filing this proceeding, Alexander invoked the court's jurisdiction under 5 U.S.C. § 1508, which authorizes a party aggrieved by an order or determination of the Board to seek review thereof by filing a petition in the United State District Court for the district in which the employee resides. This section further provides that "[a] copy of the petition shall immediately be served on the Board[.]" Nothing is mentioned in the statute regarding participation by the OSC in the review process. Because Alexander and the Board are the only proper parties to this **p. 5** proceeding, the court will grant the OSC's motion for dismissal as a party to this action.

2. Merit Systems Protection Board's Motion to Affirm 5

Title 5 U.S.C. § 1502(a)(3) provides that a State of local officer or employee may not be a candidate for elective office. 6

Under 5 U.S.C. § 1505, the Board has plenary jurisdiction to determine whether the Hatch Act has been violated. This section also authorizes the Board to determine whether the violation warrants removal from employment. 5 U.S.C. § 1505(2). "The Board's determination may be reversed only when the reviewing court determines that the Board abused its discretion, or that the decision was not in accordance with the law." State of Minnesota,

---

5 Alexander has moved for dismissal of the Board's motion to affirm, relying on Olenhouse v. Commodity Credit Corp., 42 F.3d 1560 (10th Cir. 1994), in which a Fourth Circuit panel "specifically disapproved" of the practice of filing motions to affirm in administrative review proceedings. Id. at 1579 n. 29 However, at

issue in that case was a motion to affirm which was in reality a motion for summary judgment inviting the reviewing court to rely on the evidence outside the administrative record. Id. at 1579-80. The Sixth Circuit has not adopted Olenhouse. In addition, at least one other circuit has rejected as frivolous an argument virtually identical to that which Alexander makes here. Girling Health Care, Inc. V. Shalala, 85 F.3d 211, 214, (5th Cir. 1996) (observing that, where the agency relies solely on the administrative record, "Olenhouse is factually distinguishable and logically inapplicable"). The court concludes that a motion to affirm in this case is appropriate under 5 U.S.C. § 1508.

6 5 U.S.C. § 1501(4) defines a "State or local officer or employee as "an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency[.]" Although the statute lists two exceptions to this definition, neither exception applies in this case.

P. 6 Department of Jobs & Training v M.S.P.B., 875 F.2d 179, 182 (8th Cir. 1989) (citing Oklahoma v. U. S. Civil Service Commission, 330 U.S. 127, 145-46 (1947), 67 S.Ct. 544, 554-55, 91 L.Ed. 794 (1947) and 5 U.S.C. § 1508(2)); see also Williams v. U.S. M.S.P.B., 55 F.3d 917, 922 (4th Cir. 1995) ("The Board has discretion to determine whether removal, or no penalty at all, is warranted.")

...The pertinent facts are stipulated, and the only issue presented in this case is whether removal was an appropriate penalty for Alexander's violation. 7 "Whether removal is appropriate depends on the seriousness of the violation, taken in consideration with all relevant mitigating and aggravating factors." Williams, 55 F.3d at 922.

"Partisan candidacy by a covered employee...is a per se violation of the Hatch Act." *Id.* at 920 (citing Special Counsel V. Brondyk, 42 M.S.P.R. 333, 337 (1989) and 5 U.S.C. § 1502(a)(3)). Alexander contends that sufficient mitigating circumstances exist which indicate that his removal from employment for violating the Hatch Act was not warranted.

Specifically, Alexander argues that the ALJ correctly determined that removal was not justified because the OSC "significantly contributed" to Alexander's violation. Recommended Decision [RD] at 71-70. The basis for this determination is apparently the ALJ's findings regarding Alexander's communications with the OSC's Heidi Weintraub. These findings are as follows:

---

7 Because he has asked the court to adopt the recommended decisions of the ALJ, Alexander presumably does not dispute the ALJ's determination that he violated the Hatch Act.

p. 7 7. Respondent questioned Weintraub regarding the issue of whether there is a distinction under the Hatch Act between state employees whose positions are funded by federal reimbursements as opposed to those whose positions are funded by federal grants and loans.

8. For reasons unknown, Weintraub never provided Respondent with a meaningful response to his inquiry regarding the distinction, and instead essentially dismissed his question while being rather curt and non-communicative.

9. Unbeknownst to Respondent, Weintraub was an attorney with OSC.

10. During at least one of their conversations, Weintraub did inform Respondent that he could not run for office without violating the Hatch Act even if he were in a leave of absence without pay status.

11. Weintraub never explained to Respondent how/why the distinction between the funding mechanisms was an irrelevant legal standard for evaluating coverage under the Hatch Act.

12. During the second conversation, Weintraub did inform the Respondent that he could not run

because the activities of his current position involved programs that were federally funded but did not inform Respondent that such was the relevant legal standard for determining Hatch Act coverage.

Recommended Decision at 70. 8 However, the ALJ also found that

---

8 This finding appears to be based on Alexander's own explanation of why he chose to disregard Weintraub's advice:

> ...I asked [Weintraub], am I covered, she said you're covered, that's it. I said well, you know, there['re] some questions about Medicaid not being grants or loans, where is the citation that says I'm covered. If you have that, I'm not running. She didn't-- said that I don't need to do that, what I told you is you're covered, that's all you need to know. I said this person is having a hard day, I will call back in a few days.
>
> [I called back] I said, you know, this is Bob Alexander, I'd like to ask you again my question. I think my first question was about leave of absence, is that covered, and it was reminded me this morning, yes, we talked about that. She says, leave of absence isn't sufficient...I said
>
> **p. 8** [footnote continued at bottom of p. 8] yes, but in the back of this [some written materials Alexander had read [Michigan Civil Service Study on Hatch Act]], the last page, here is a statement saying there are 3,000 confusing and conflicting contradictory rulings in the Hatch Act that state employees need to be wary of. And she says, you know, look I'm going to send you some written materials to answer your questions. You know, because I was asking her what rule or citation can you give me that verifies that Medicaid is covered by the Hatch Act, and she didn't do that. I said, fine, you're going to send me some materials, great, I look forward to getting them, and if that answered my question, you've done what you're supposed to do.
>
> And so the conversation ended. A week or so later I got the Political Activities and the State and Local Employee [booklet, ...and I read through it for anything about Medicaid or reimbursement being covered by the Hatch Act ... found nothing]...I said this doesn't answer my questions. Transcript of Hearing at 179-80, 185.

[top half of p. 8 continued #13 to 16 from the ALJ's RD]

13. One day after filing his petitions to run for partisan office and upon his own initiative, Respondent spoke with John Sorbet, a DSS employee and a person from whom Respondent felt he could get an honest answer.

14. Sorbet informed Respondent that the federal funding of his **p. 71** [Respondent's] position was made available to the Michigan DSS by so-called quarterly grant awards from the federal government.

15. Upon being informed of such information by Sorbet, a reasonably prudent person would have concluded that the federal funds paid to DSS were grants or would have inquired further regarding the implications of the quarterly grant awards vis a vis the Hatch Act.

16. Respondent made no such inquiry.

The Board disagreed that Weintraub's actions or behavior could be considered mitigating circumstances:

Ms. Weintraub gave Mr. Alexander a correct interpretation of the law, and she sent him written materials explaining the law and informing him that he could seek a written opinion. He understood her advice, but disagreed with it, and chose to disregard it. We disagree with the ALJ that Mr. Alexander acted reasonably in disregarding Ms. Weintraub's warning merely **p. 9** because she was abrupt or because she did not provide him an unsolicited written opinion.

In sum, unlike the ALJ, we are not persuaded by Mr. Alexander's attempt to place the blame for his

> knowing violation of the Hatch Act on the failure of others to adequately dissuade him...His selective crediting of the advice he received cannot be justified by his purported standard of requiring supporting legal citations. The scant sources of support he found for his loophole -- the statements that Medicaid was funded by a federal reimbursement and that there are 3,000 conflicting rules about the Hatch Act -- were not supported by legal citations. Moreover, after Mr. Sorbet told him that Medicaid was funded by a grant award, he cannot have continued to rely on his loophole in good faith. Mr. Alexander gambled by running for office, hoping that he would win the election and resign his position, or that his violation would go unnoticed. Unfortunately for him, he gambled and lost.

Final Decision and Order at 18-19, 21-22 (footnote and citations omitted.)

This is neither a difficult nor a close case. The stipulated facts and Alexander's own admissions condemn his petition to failure. Alexander does not claim to have been unaware of the Hatch Act, and he was advised by authoritative sources that his candidacy would violate the Act. Nonetheless, he persisted in running. Alexander's contention that his violation does not justify his removal from employment because he distrusted the advice he received that his position was covered by the Act -- notably correct advice -- is contradicted by the fact that he continued his candidacy even after someone he did trust confirmed that advice.

On appeal, Alexander continues to emphasize "[n]o one verified their opinion that [he] was covered by the Act because Medicaid received federal reimbursement through grants[.]" Petitioner **p. 10** Alexander's Response to Merit Systems Protection Board's Motion to Affirm at 4. Of course, ignorance of the law cannot excuse Alexander's violation of the Act, particularly where he has been advised

what the law is but simply refuses to believe it. Moreover, the court feels constrained to note that Alexander's purported standard of insisting on legal citations does not mitigate his violation. He claims to have needed a legal citation to believe his position was funded by grants, yet he readily accepted that his position could be defined with reference to the term "reimbursement" without demanding a legal citation to support the characterization. Alexander has admitted that in his position, he had to be able to respond quickly to questions by referring to specific regulations. Tr. At 185-87. As Alexander stated himself at the hearing, "they can give me the Regulations, they can give me a Court ruling. I'm competent, I can go find these things on my lunch hour. If I'd see it in writing I would have stopped campaigning as soon as they gave me a citation." Tr. At 185. Alexander could easily have confirmed what he was told about the applicability of the Hatch Act to his position, had he chosen to do so.

Alexander claims that the Hatch Act's distinction between federal and state employees unfairly discriminates against the latter, violating the equal protection guarantee inherent in the due process clause of the Fifth Amendment. See Schweiker v. Wilson, 450 U.S. 221, 226 n. 6 (1981) (Fifth Amendment imposes same standard on federal government as Fourteenth Amendment imposes on **p. 11** states). Specifically, Alexander contends that the Hatch Act is.

> Unconstitutional on its face and as applied to him, insofar as it fails to authorize sanctions other than removal, particularly in light of substantial mitigating evidence. As applied by [the Board], the law denies state employees the same range of sanctions applicable to similarly situated federal employees under 5 U.S.C. § 7326. By unanimous vote of the Board, for example, Federal employees may receive as little as a 30-day suspension without pay for an identical violation, in lieu of removal. Since there is no rational basis for the dissimilar treatment of similarly situated

> state and federal employees, [the Board's] failure to consider suspension without pay as an appropriate penalty in petitioner's case is not in accordance with the due process and equal protection guarantees of the Fifth Amendment to the U.S. Constitution.

Petition for Judicial Review at 8-9. 9

"[P]lainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited." U. S. Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 568-71 (1973). Alexander has not indicated whether he asserts his challenge at the level of rational basis. See Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (where statutory classification burdens

---

9 Title 5 U.S.C. § 1505 provides, with respect to State or local officers or employees, that after a hearing, the Board shall "determine whether a violation ...has occurred" and "determine whether the violation warrants the removal of the officer or employee from his office or employment[.]" With respect to federal employees, § 7326 provides that an individual who violates the Act

> shall be removed from his position, and funds appropriated may not be used to pay the employee or individual. However, if the [Board] finds by unanimous vote that the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed by the Board.

p. 12 neither a suspect group nor a fundamental interest, government need only assert a rational basis for it); see also Sibley v. United States Dept. Of Educ., 913 F. Supp. 1181, 1189 (N.D. Ill. 1995) ("A classification based on federal employee-status bears none of the hallmarks of classifications subject to heightened review"), aff'd 111 F.3d 133 (7th Cir. 1997) (Table). However, "[f]or regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." United

Public Workers of America v. Mitchell, 330 U.S. 75, 101 (1947). "Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

The court finds no necessity to address Alexander's equal protection challenge because a decision on that question would not benefit him in any event. Alexander's constitutional challenge is essentially that state employees are penalized more harshly for their activities in violation of the Hatch Act. However, the statute can easily be read doing just the opposite. Under 5 U.S.C. §1505, the only penalty which may be imposed on a state **p. 13** employee in violation of the Act is removal. Williams, 55 F.3d at 922. Therefore, if the Board determines that removal of the State employee is not warranted, it may not impose any penalty. Special Counsel v. Winkler, 56 M.S.P.R. 213, 214 (1992); Special Counsel v. Suso, 26 M.S.P.R. 673, 679 n. 11 (1985). Moreover, a state agency need not remove a violator unless it wishes to avoid the loss of federal funding. Fela v. US MSPB, 730 F. Supp. 779, 784 (N.D. Ohio 1989); 5 U.S.C. §1506. In contrast, 5 U.S.C. §7326 requires the Board to impose a penalty on federal employees -- consisting of not less than 30 days' suspension without pay -- even where the Board determines that the violation does not warrant removal. In other words, although a state employee may avoid a penalty for violating the Act, a federal employee may not avoid being penalized. See Special Counsel v. Campbell, 58 M.S.P.R. 170, 182 (1993), aff'd 27 F.3d 1560 (Fed. Cir. 1994). Because the Board determined that Alexander's violation warranted removal, it could not have imposed any lesser penalty even if Alexander had been a federal employee.

"Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973). Assuming that a state employee could conceivably raise an equal protection challenge based on the difference between 5 U.S.C. §1505 and § **p. 14** 7326, Alexander is not a proper party to do so because the Board found that he willfully violated the Act. If the plaintiff has not suffered, the court is not called upon to speculate whether state employees or other persons might in some event have cause to complain. See Collins v. Texas, 223 U.S. 288, 295-96 (1912).

Constitutional issues should not be needlessly confronted. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. And Constr. Trades Council, 485 U.S. 568, 575 (1988). "The Supreme Court has long endorsed, if not always adhered to, the notion that federal courts should address constitutional questions only when necessary to a resolution of the case or controversy before it. This is a fundamental rule of judicial restraint." United States v. Cusumano, 83 F.3d 1247, 1250-51 (10th Cir. 1996) (footnote and citations omitted). Because any difference in the statutory penalties has not adversely affected Alexander, whose removal the Board determined was warranted, the court does not consider this to be a proper occasion to address the constitutional issue which Alexander raises. 10

10 Alexander has not expressly indicated what he believes to be the remedy for any alleged unconstitutionality in the penalty provisions of the Hatch Act. At one point he suggests that he expects the court to order the Board to impose a penalty other than removal. See Petition for Judicial Review at 11-12 (requesting that "[t]he court, if it affirms the Board's Order, modify the Order so that the employee be suspended and not terminated"). However Congress has dictated that the only penalty which may be

imposed for violations of the Hatch Act such as that committed by Alexander is removal. 5 U.S.C. § 1505(2). Establishing the penalty for violation of a federal statute is a legislative function, not a judicial one. This court would simply not order the Board to bypass the legislated penalty contained in an otherwise constitutional statute.

p. 15 **CONCLUSION**

The court has given consideration to Alexander's other allegations, including (1) his contention that the administrative record is inaccurate and incomplete, and (2) his claim of selective prosecution. Alexander has failed to establish that any alleged errors or omissions in the record detract from the substantiality or strength of the evidence supporting the Board's determination that removal was warranted. In addition, the court finds Alexander's allegation of selective prosecution to be utterly meritless. 11

For the foregoing reasons, the court hereby GRANTS the OSC's motion to dismiss it as a party to this action. The court further hereby GRANTS the Board's motion to affirm. That action is therefore DISMISSED with prejudice.

So ordered this 30th day of September 1997.

Wendell A. Miles, Senior Judge

---

11 Alexander alleges that evidence withheld from him by the OSC "would establish the OSC's arbitrary and capricious pattern of enforcement in which OSC fails to fulfill its equally important task of educating employees to prevent violations of the Hatch Act, and instead concentrates on penalizing employees after the fact." Petition for Judicial Review at 10. Alexander seemingly argues that his violation should be excused because the OSC failed to dissuade him from committing that violation. Like the Board, the court finds this argument wholly unpersuasive. Moreover, the Court notes that selective enforcement is not a defense unless "the defendant can prove that the prosecutor or investigator intentionally 'singled him out' for punishment because of membership in a protected group or the exercise of a constitutionally protected right." Futernick v Sumpter Twp., 78 F.3d 1051, 1060 (6th Cir. 1996). Neither circumstance is presented here.

C. Final Decision and Order by the Merit Systems Protection Board, October 4, 1996

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL, Petitioner, v. ROBERT D. ALEXANDER and MICHIGAN DEPARTMENT OF SOCIAL SERVICES, Respondents	DOCKET NUMBER: CB-1216-93-041-T-1 DATE: OCT. 4, 1996

Jacqueline C. Benditt, Esquire, Washington, DC, for the petitioner.
George V. Warren, Esquire, East Lansing, Michigan, for respondent Alexander.
No appearance for respondent Michigan Department of Social Services.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonia C. Amador, Member

FINAL DECISION AND ORDER

This case is before the Board on a Recommended Decision issued by Administrative Law Judge (ALJ) Delbert R. Terrill, Jr. In that decision, the ALJ recommended that the Board determine that **p. 2** respondent Alexander violated 5 U.S.C. § 1502(a)(3), a provision of the Hatch Political Activities Act (Hatch Act), as alleged by the Special Counsel, but that the violation does not warrant removal under 5 U.S.C. § 1505.

For the reasons set forth below, we ADOPT in part and REVERSE in part the Recommended Decision. We hold that Mr. Alexander violated the Hatch Act, and that his violation was of such scope and effect as to warrant removal from his position.

BACKGROUND

(District Judge's Opinion listed the pertinent facts as stated by the MSPB on pages 2 - 13 of this Background)

p. 11, line 22

The ALJ found that Mr. Alexander knowingly and willfully violated the Hatch Act by pursuing his candidacy in the face of **p. 12** many warnings to the contrary. 2 However, the ALJ held that the circumstances of the case did not warrant Mr. Alexander's removal because of the character of the warnings he received from DSS employees and OSC. The ALJ found that the opinions of DSS employees were tainted by an improper political effort on the part of DSS to have Mr. Alexander prosecuted under the Hatch Act, and that Mr. Alexander reasonably discounted those opinions after he successfully grieved his RIF demotion. The ALJ faulted Weintraub for her abruptness, her failure to fully explain the basis for her opinion that Mr. Alexander was covered by the Hatch Act, her failure to provide Mr. Alexander legal citations to support her opinion, and her failure to tell him that he could obtain a written opinion from OSC. The ALJ found no evidence to impute DSS' improper political motives to OSC, but nonetheless opined that the

---

2- The ALJ properly declined to consider Mr. Alexander's constitutional challenge to the Hatch Act and to OSC's decision to prosecute him. See *Malone v. Department of Justice*, 14 M.S.P.R. 403, 406 (1983). We note, however, that the Supreme Court has repeatedly upheld the constitutionality of the Hatch Act. *See, e.g., United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 568-71 (1973); *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 142-44 (1947); *United Public Workers v. Mitchell*, 330 U.S. 75, 93-103 (1947).

See also *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding constitutionality of a state statute modeled on the Hatch Act).

P. 13 tone of DSS' letter informing OSC may have influenced OSC's decision to prosecute Mr. Alexander.

The Special Counsel had filed exceptions to the Recommended Decision arguing that the ALJ's determination that removal is not warranted is not in accordance with applicable law or supported by the record. Mr. Alexander has responded to OSC's exceptions in support of the Recommended Decision.

ANALYSIS

Mr. Alexander violated the Hatch Act.

The ALJ misconstrued the applicable law in his analysis of whether Mr. Alexander violated the Hatch Act. The ALJ erroneously recited the law requiring a knowing and willful violation in order for there to be a violation of the Hatch Act. RD at 4. To demonstrate a violation of the Hatch Act, OSC must demonstrate only that an employee covered by the Hatch Act engaged in political activity prohibited by the Act. *See Williams v. Merit Systems Protection Board*, 55 F.3d 917, 920 (4th Cir. 1995) ("[p]artisan candidacy by a covered employee ... is a *per se* violation of the Hatch Act"), cert. denied, 116 S. St. 771 (1996); *Special Counsel v. Murdock*, 61 M.S.P.R. 403, 406 (1994) (same). The employee's intent is not relevant to the issue of whether a violation occurred. *See id.* Rather, the employee's intent is relevant to the determination of the penalty to be imposed for the violation. **p. 14** *Special Counsel v. Purnell*, 37 M.S.P.R. 184, 200 (1988), *aff'd sub nom. Fela v. Merit Systems Protection Board*, 730 F. Supp. 779 (N.D. Ohio 1989).

We agree with the ALJ that Mr. Alexander violated the Hatch Act by his candidacy. The Hatch Act covers

employees of state executive agencies "whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency". 5 U.S.C. § 1501(4) (1994). During the time of his candidacy, Mr. Alexander occupied the position of Departmental Analyst in the Institutional Policy Division of DSS' Medical Services Administration. In this position, Mr. Alexander analyzed policies related to the administration of Michigan's Medicaid Program. Fifty percent of the cost of Michigan's Medicaid Program, including Mr. Alexander's salary, is funded by grants from the United States Department of Health & Human Services under the federal Medicaid Program. Thus, Mr. Alexander was principally employed in connection with a federally funded activity.

Mr. Alexander argued before the ALJ that he did not occupy a covered position because Michigan's Medicaid Program is funded by federal reimbursement, not by federal loans or grants. CF, tab 4 at 2. As discussed above, the language of the Medicaid statute and regulations does not support such an interpretation. Moreover, the **p. 15** Civil Service Commission determined more than fifty years ago that federal payments made to states in the form of reimbursements to fund highway construction costs constituted funding by "grants or loans" within the meaning of the Hatch Act. *In re. Slaymaker*, 2 P.A.R. 56, 57 (1943). 3 This interpretation has been repeatedly and consistently applied, and it has been approved by the federal courts. *See, e.g., In re Pizzutello*, 1 M.S.P.R. 274,276 (1979); *In re Ramshaw*, 2 P.A.R. 768, 770-771 (1966) *aff'd*, 266 F. Supp. 73 (E.D. Idaho 1967); *In re Engelhardt*, 2 P.A.R. 632, 638, *aff'd*, 197 F. Supp. 806 (M.D. Ala. 1961), *aff'd*, 304 F.2d 882 (5th Cir. 1962). The Board had found state Medicaid employees to be covered by the Hatch Act. *Special Counsel v. Winkler*, 55 M.S.P.R. 419, 421 (1992) (order withholding federal Medicaid funding after state agency refused to remove employee found to have violated the Hatch Act).

Mr. Alexander's violation of the Hatch Act warrants removal.

The ALJ also misconstrued the applicable law in his analysis concerning the appropriate penalty in this case. The ALJ found that Mr. Alexander knowingly and willfully violated the Hatch Act because of the warnings Mr. Alexander received from his supervisor, an

---

3 The citation "P.A.R." refers to the "Political Activity Reporter" which contains decisions of the Civil Service Commission concerning the Hatch Act.

p. 16 employee in the personnel office of his agency, and OSC were sufficient to notify a reasonably prudent person that his candidacy would violate the Hatch Act. RD at 67. However, the ALJ concluded that those warnings were not the type OSC could rely upon to seek the penalty of removal. RD at 68-69. This conclusion is incorrect. Removal is warranted where the violation occurred under circumstances indicating that the employee deliberately disregarded the law. *Special Counsel v. Kelley*, 60 M.S.P.R. 668, 670-71 (1994); Purnell, 37 M.S.P.R. at 201.

Once it has been demonstrated that a state employee violated the Hatch Act there are only two alternatives: removal or no penalty. Purnell, 37 M.S.P.R. at 198-99. *See also Minnesota Department of Jobs and Training v. Merit Systems Protection Board*, 875 F.2d 179, 182 (8th Cir. 1989) (en banc)(Minnesota). In considering whether removal is warranted, the Board looks to the seriousness of the violation, considering all aggravating and mitigating factors that bear upon the seriousness of the violation. *Purnell*, 37 M.S.P.R. at 200. These factors include: (1) the nature of the offense and the extent of the employee's participation; (2) the employee's motive and intent; (3) whether the employee had received the advice of counsel regarding the activities at issue; (4) whether the employee ceased the activities at issue; (5) the employee's past employment record; and (6) the political coloring

p. 17 of the employee's activities. *Id.* Factors that do not bear upon the seriousness of the violation should not be considered. *Kelley*, 60 M.S.P.R. at 673. Candidacy in a partisan political election is a substantial and conspicuous violation of the Hatch Act with clear political coloring. *Special Counsel v. Mahnke*, 54 M.S.P.R. 13, 18 (1992).

The record fully supports the ALJ's finding that Mr. Alexander knowingly and willfully violated the Hatch Act, and Mr. Alexander does not challenge that finding. We find that Mr. Alexander chose to engage in partisan political activity after receiving information that would cause a reasonably prudent person to avoid such activity. *See Murdock*, 61 M.S.P.R. at 406. He knew from the outset that he was probably covered by the Hatch Act. Yet, he chose to rely on a linguistic distinction between "reimbursement" and "grants and loans" without considering whether this distinction was supported by the Medicaid statute or regulations. Ms. Weintraub, Mr. Servais, and Dr. Kemp repeatedly warned him that he was covered by the Hatch Act because he worked for a federally funded program. No one advised him to the contrary. Ms. Weintraub sent him a pamphlet on the Hatch Act that would have dispelled many of his misconceptions. However, he did not read the entire pamphlet. The part of the pamphlet that he read stated that he could submit any specific **p. 18** questions in writing to OSC, but he chose not to do so. Mr. Sorbet informed him that the state Medicaid program was funded by a federal grant award. Under these circumstances, Mr. Alexander's decision to run for office constituted a knowing assumption of the risk that his actions would violate the Hatch Act. See *Minnesota*, 875 F.2d at 184; *Murdock*, 61 M.S.P.R. at 406. The above-quoted testimony concerning his decision to run shows as much.

We reject the ALJ's conclusion that the advice of Ms. Weintraub, Mr. Servais, and Dr. Kemp cannot support a determination that removal is warranted. The ALJ's findings

of fact relevant to this conclusion are not supported by the record. Ms. Weintraub, Mr. Servais, and Dr. Kemp each provided Mr. Alexander correct information concerning his Hatch Act coverage. Ms. Weintraub gave Mr. Alexander a correct interpretation of the law, and she sent him written materials explaining the law and informing him that he could seek a written opinion. 4 He understood her advice, but disagreed with it, and chose to disregard it. We disagree with the ALJ that Mr. Alexander acted reasonably in disregarding Ms. Weintraub's warning merely because she was abrupt or because she

---

4 OSC has also informed the public by regulation that interested persons may seek an advisory opinion on the Hatch Act. 5 C.F.R. § 1800.3 (1996).

p. 19 did not provide him an unsolicited written opinion. We note that OSC's Hatch Act unit receives more than 1600 telephone inquiries and 300 requests for written opinions each year. See *OSC, Fiscal Year 1992 Annual Report 15* (1992).

Nor did Mr. Alexander reasonably disregard the advice of Mr. Servais and Dr. Kemp. As a matter of public policy, we cannot sanction a public employee's disregard of the advice of his agency's personnel office and his supervisor merely because he had successfully challenged a personnel action in the past. Mr. Alexander sought out the advice of Mr. Servais and Dr. Kemp. The advice of each was correct and consistent with that of the other and with that of Ms. Weintraub. Mr. Alexander received no advice that was inconsistent with that provided by Mr. Servais and Dr. Kemp.

We find no evidence of a political attempt by DSS to have Mr. Alexander prosecuted. 5 The ALJ based this contention on the facts that: (1) DSS was aware of Mr. Alexander's involvement in the campaign to recall the governor; (2) Mr. Servais informed OSC of Mr. Alexander's candidacy; and (3) after learning of OSC's

---

5 There is absolutely no evidence in the record suggesting that OSC prosecuted Mr. Alexander because of a political motive on its own part or on the part of DSS.

P. 20 investigation and complaint, DSS managers discussed what the agency should do. As a preliminary matter, we note that government officials are presumed to discharge their duties in good faith. *McEachern V. Office of Personnel Management*, 776 F.2d 1539, 1544 (Fed. Cir. 1985).

We do not believe that the facts identified by the ALJ add up to a political conspiracy. While DSS knew of Mr. Alexander's involvement with the recall campaign, the only action it took against him related to the recall effort was to counsel him about using agency resources for that purpose. The only personnel actions taken by the agency against Mr. Alexander -- the RIF demotion and the denial of his request for a voluntary layoff -- were not personal to Mr. Alexander. Other DSS employees were affected by the same actions at the same time. Further, when Mr. Alexander approached Mr. Servais for advice, Mr. Servais had never heard of Mr. Alexander, and was unaware of his involvement in the recall campaign.

The ALJ faulted Mr. Servais' decision to inform OSC about Mr. Alexander's activities as inconsistent with a memo Mr. Servais prepared during an earlier Hatch Act matter. In that memo, Mr. Servais recommended that when DSS became aware of future possible Hatch Act violations by DSS employees, it should "inform the employee of the provisions of the Act and suggest to them that they **p. 21** deal directly with [OSC]." RX 65 Mr. Servais followed that exact practice in this case. He warned Mr. Alexander against running for office and referred him to OSC. The memo does not address what DSS should do in the event that the employee informs the agency that he intends to disregard the advice of OSC and run for office anyway, as happened here. While the memo notes that DSS is under

no obligation to report Hatch Act violations, it does not suggest that DSS should never do so. Mr. Servais testified that DSS had no set policy concerning the reporting of potential Hatch Act violations to OSC. Tr. II at 553.

Nor can we fault DSS managers for considering what actions the agency should take after it learned of OSC's investigation and complaint. See Tr. At 576-78. Insofar as the agency faced the possible forfeiture of federal funding in the amount of twice Mr. Alexander's annual salary, we do not think such contingency planning inappropriate. Further, at this meeting, DSS decided to take no action until the Board issued a decision. Thus, we find no evidence of a pernicious agency intent.

In sum, unlike the ALJ, we are not persuaded by Mr. Alexander's attempt to place the blame for his knowing violation of the Hatch Act on the failure of others to adequately dissuade him. *See Kelley*, 60 M.S.P.R. at 671-72 (employee's choice to disregard Hatch Act was not excused by OSC's failure to point out the **p. 22** benefits of obeying the law); **Minnesota**, 875 F.2d at 184 (employee's reliance on erroneously decided district court case did not legitimize his indifference to many warnings he received). His selective crediting of the advice he received cannot be justified by his purported standard of requiring supporting legal citations. The scant sources of support he found for his loophole -- the statements that Medicaid was funded by a federal reimbursement and that there are 3,000 conflicting rules about the Hatch Act -- were not supported by legal citations. Moreover, after Mr. Sorbet told him that Medicaid was funded by a grant award, he cannot have continued to rely on his loophole in good faith. Mr. Alexander gambled by running for office, hoping that he would win the election and resign his position, or that his violation would go unnoticed. Unfortunately for him, he gambled and lost.

ORDER

If the Michigan Department of Social Services does not remove Robert Alexander within 30 days of the date of this order, the Board will order the appropriate federal agency to withhold an amount equal to two years' of Mr. Alexander's pay from the federal loans and grants made to the agency pursuant to 5 U.S.C. § 1506(a)(1). Thus, the Department of Social Services may choose either to remove Mr. Alexander or to forfeit receipt of federal funds in an amount equal to two years of his pay. We further note **p. 23** that if Mr. Alexander is hired by a state or local agency in the State of Michigan within 18 months after his removal, the Board will order a withholding of federal funds in an amount equal to two years of Mr. Alexander's salary pursuant to 5 U.S.C. § 1506(a)(2).

The Special Counsel is hereby ORDERED to notify the Board within 60 days of its final decision whether respondent Alexander has been removed or ordered, unless this decision is stayed and respondent Alexander is suspended in accordance with 5 U.S.C. § 1508. It is further ordered that, after the first submission, the Special Counsel shall thereafter submit to the Board at three six-month intervals evidence concerning whether respondent Alexander has been reemployed by any state or local agency in the State of Michigan for a period of 18 months as provided by 5 U.S.C. § 1506

This is the final order to the Merit Systems Protection Board.

D. Recommended Decision by ALJ Delbert Terrill, Jr.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL, Petitioner, V. ROBERT ALEXANDER and STATE OF MICHIGAN DEPARTMENT OF SOCIAL SERVICES, Respondents.	DOCKET NUMBER CB-1216-93-0041-T-1 DATE: July 31, 1995

RECOMMENDED DECISION

APPEARANCES

David J. Gorman, Esq. on behalf of Petitioner, U.S. Office of Special Counsel, Washington, D.C.

George V. Warren, Esq. on behalf of Respondent, Robert Alexander

No appearance for Respondent, State of Michigan, Department of Social Services

Delbert R. Terrill, Jr., Administrative Law Judge

(The pertinent items from the Applicable Law, Rulings, Stipulated Facts and Summary of Evidence on pages 2 to 52 were noted in the Sixth Circuit Decision, District Court Opinion, and the MSPB's Final Decision and Order)

DISCUSSION AND ANALYSIS

p. 56, line 30 ....This is not a simple case where a state employee runs for partisan office while attempting to hide his actions and later gets caught and then attempts to claim ignorance. Nor is this a case where a state employee proceeds to run for partisan office without first seeking advice but whose actions are later discovered, who is then informed by competent authority but still chooses to ignore that advice. Nor is this a case like Kelley where the Respondent has received from OSC a written opinion letter detailing the applicability of the Hatch Act to Respondent's particular situation. Nor is this a case similar to Kehoe where the Respondent ran for office but OSC deferred prosecution because of an initial confusion regarding the applicability of the law to Respondent, only to have Respondent run again after being warned in writing twice. Instead, the facts here demonstrate that Respondent was the one who initiated the effort to determine his coverage under the Act. He not only initiated efforts to determine his coverage, but was also the person who unrelentingly pursued the matter while at the same time, he continued to keep his supervisor, Dr. Kemp and DSS advised of his major efforts and actions.

Respondent admitted that, prior to initiating his effort to determine his coverage, he had general knowledge of the Hatch Act and its prohibitions on political activity as a result of having been involved in a community development block **grant** program in the **p. 57** mid-1970's, as a result of working in Lansing in the state legislature, and as a result of working on a DSS energy assistance **grant** program in the mid-1980's. While contemplating running for office, Respondent began to question whether a person in his current position who runs for political office would violate the Hatch Act. Such questioning was certainly understandable given the on-going metamorphosis of state and federal laws

governing political activity of state employees.[1] During the period of time of Respondent's cognizance of such laws and relevant to the case herein, the early 1970's to 1992, Michigan law which initially had precluded state employees from being members of political parties had evolved to allowing state employees to run for partisan political office so long as they requested and obtained a leave of absence. There is record evidence that state government organizations even facilitated such individual campaigns by moving individuals to non-federally funded positions. During the same general time period, Congress on numerous occasions had proposed and passed revisions to the Federal Hatch Act. Having an abiding interest in politics, Respondent had been for years rather vigilant in following this "metamorphosis." Logically, at the time he was beginning to seriously consider running for office, Respondent took much of the initiative and made the effort to determine his own coverage under the Hatch Act. Further, the facts here clearly demonstrate that Respondent is a head-strong person who has a thirst for detail and citation. It was very clear that Respondent is a "show me" type of individual who doesn't believe something unless he sees it in writing. Dr. Kemp corroborated this perception of Respondent when he testified that Respondent's efforts to get clarification regarding the Hatch Act were symbolic of Respondent's doggedness and hard-headedness which Dr. Kemp indicated that Respondent employs on every issue. Respondent appeared to be even a bit controlling, given that during the hearing, the undersigned had to advise Respondent on more than one occasion to refrain from attempting to be his own lawyer.

Nor is this a case involving an employee who was seldom engaged with his own agency regarding personnel matters. Instead, Respondent had a predisposition regarding his agency as it also had regarding him. The facts demonstrate that shortly before his run for office,

---

[1] These revisions were either vetoed or were periodically passed by either the House of Representatives or the Senate but not both.

Respondent had been engaged with his agency's Human Resources Office on a number of personnel fronts including times proximate to the time Respondent was being advised by this very same office regarding the applicability of the Hatch Act to his position. As a result, he perceived that he had reason to distrust his agency's Human Resources Office and its advice. Respondent's distrust was based on a number of DSS actions including: its actions during a reduction-in-force [which Respondent grieved and won] including not only its improper actions during the RIF but also its nearly six-month delay in implementing the grievance examiner's decision which was longer than the implementation for other grievants; ...Nor is the fact that he distrusted the advice of DSS an artifice created for litigation. As early as July 20, 1992 during the OSC investigative interview, Respondent had immediately voiced his distrust of DSS. As also discussed, infra, his distrust was reasonable.

p. 63 ....In response to raising the issue of his coverage by the Act, Respondent first received oral advice from Dr. Kemp, his supervisor. Dr. Kemp informed Respondent that he [Respondent] was covered. Dr. Kemp testified... he was "very, very clear" about having given such advice. However, Dr. Kemp's advice alone is not the type of competent advice upon which OSC can rest its case in establishing the requisite "knowledge and willfulness." Certainly, his advice can not be given more weight than Respondent's opposite conclusion at that time that he was not covered.....

p. 65 ...Nevertheless, the point here is that Dr. Kemp was clearly offering at best dated complaints which occurred prior to his tenure as Respondent's supervisor. Such corroborated the undersigned's impression of the demeanor of his testimony. Finally, Dr. Kemp's testimony denying that he had stated to Respondent that Servais should not have written to OSC was contradicted by Respondent's testimony and Respondent's notes.

With respect to Servais, his testimony was also not credible on the issue of whether Respondent had raised the

reimbursement distinction. Servais also contended that Respondent had a copy of P-14 before OSC sent a copy to Respondent. This was also contradicted by Respondent. Apparently, Servais was relying on his notes, but his notes fail to indicate when Respondent informed Servais that Respondent had made this statement. ...In early April at Dr. Kemp's suggestion, Respondent telephoned Servais. Servais testified that he immediately informed Respondent that he was covered by the Act whereas Respondent testified that Servais initially indicated that he was not sure if Respon-dent's position's was federally funded. Servais' own notes appear to support Respondent's version. First, Servais' notes do not reflect that he initially advised Respondent at all. Secondly, the notes indicate that only after speaking with Respondent did Servais call a person in finance and only then informed Respondent not to run or otherwise he would be in violation of the Hatch Act. Further, as noted supra, Servais was the person who acted contrary to DSS policy by making the referral to OSC and who appeared to have been politically motivated to act against Respondent. Servais' portrayal of his own actions on behalf of DSS as attempting to be neutral was not believable.

After telephoning Servais and as a result of Servais' direction, Respondent contacted Weintraub of OSC. Respondent's **p. 66** testimony as to the content and tone of his discussions with Weintraub on two occasions as to whether he was covered by the Act was uncontradicted. OSC could have called Weintraub as a witness to testify regarding the conversations between Respondent and Weintraub, but did not. Respondent's testimony was otherwise found credible; his version of the conversation with Weintraub was uncontradicted and therefore also credited. Respondent testified that Weintraub informed him that he was a covered employee and that if he chose to run, he could not be an employee of his current agency. Respondent also testified that he asked for verification of such a position. Respondent testified that he inquired of Weintraub, given that he was in a position the funding for which was **reimbursed** in part with federal funds, whether he was still

covered given that the Act uses the terms **grants** and **loan.** Perhaps, Weintraub's response is indicative of her perception that she was dealing with a flake or ...wasting her time. While Respondent was confused on the issue and was in fact raising an irrelevant distinction; nevertheless, he had a legitimate question. Yet, apparently Weintraub felt no need to be informative and essentially refused to dignify Respondent's question with an answer. Weintraub's dismissive answer and unresponsive attitude were hardly conducive to communication and are the type of condescending government employee conduct that understandably causes distance and anger in the general populace.

If anyone should have been expected to take the time to explain to Respondent how Medicare **reimbursements** are treated for purposes of the Act it should have been OSC's employee Weintraub and not Dr. Kemp or even Servais. OSC cited in its brief to In re Ramshaw. Had Weintraub taken the time to bring this case to Respondent's attention, Respondent's question would have been answered. Further, Weintraub could have taken the time to research the public statutes and given Respondent the answer he received eventually from the HCFA employee shortly before the hearing. To complain that Respondent could and should have asked for a written advisory opinion when Weintraub never even bothered to inform him that such an option existed does not strengthen OSC's position. Given that in late 1988 or early 1989 Respondent saw P-12, OSC argues that in 1992 he should have remembered to ask Weintraub for such an opinion. Such an argument would expect that a reader of a pamphlet over three years earlier would remember such detail. Such is not reasonable. Also, the contrast between the lack of helpfulness displayed to Respondent by Weintraub as compared to how Servais was treated in 1990 in response to his letter regarding another DSS employee is rather stark. On the very point of a written advisory opinion, Servais was advised by OSC in 1990 to submit in writing a request for a written advisory opinion. Respondent's testimony that he was never so advised by OSC, as demonstrated by Exhibits R-65 and 66, is uncontradicted.

Accordingly, Weintraub's advice to Respondent is not the type of competent advice upon which OSC can assert that this Respondent **p. 66** knowingly assumed the risk.

While the admonitions received by Respondent are insufficient in and of themselves to prove that Respondent knowingly and willfully violated the Hatch Act by being willing to assume the risk of such violation, other evidence nevertheless does demonstrate such. Clearly, Respondent was acting reasonably in initially pursuing his inquiry as to whether he was covered by the Act. His initial contacts with his supervisor and Servais were perfectly responsible and normal. Even their admonitions, while perhaps causing a reasonably prudent person to be concerned, were not sufficiently authoritative to conclude knowledge and willfulness. Nor can it be concluded that Respondent's actions in contacting OSC were unreasonable, including his follow-up call given his first interchange with Weintraub. However, after the second contact with OSC's Weintraub, a reasonably prudent person's antennae would be up as to a potential problem with continuing the political campaign. Respondent's continued inquiry even in the face of the OSC's second admonition was still reasonable in that he had yet to receive an answer to his question. However, once Sorbet undercut or at least gave a basis for a reasonably prudent person to question the validity of Respondent's **reimbursements** distinction, Respondent by continuing the campaign demonstrated a willingness to risk the consequences of such. Respondent's stipulation and testimony as to Sorbet's advice is given great weight. While Sorbet is a DSS employee, he was selected by Respondent himself for such advice. Accordingly his advice to Respondent could not be disregarded by Respondent as being a pro-DSS agency data point with an anti-Respondent bias. Instead of continuing after receiving Sorbet's information, a reasonably prudent person would have either folded up the political tent or would have begun to assume the risk of a violation of the Act. Respondent's testimony that he did not think he could quit at that point was weak. Further, once informed that OSC was investigating his actions as a Hatch Act violation,

a reasonably prudent person would have been making efforts to clarify the situation and/or offer to cease campaigning. Respondent did neither. Respondent's response that he did not think he could quit the campaign was again weak. Accordingly, Respondent did not violate the Act when he first filed his petitions on May 11, 1992. His violation began and continued on May 12...after having received Sorbet's factual information. Petitioner demonstrated by a preponderance of the evidence that Respondent was willing to assume the risk of being in violation of the Act.

Issue: What sanction, if any, ought to be imposed?

The facts herein in light of the Blackbourne/Purnell factors that

(1) the nature of the offense and the extent of the **p. 68** employee's participation;
(2) the employee's motive and intent;
(3) whether the employee had received advice of counsel regarding the activities and whether the employee had ceased the activities;
(4) the employee's past employment record; and
(5) the political coloring of the employee's activities

must be considered in determining the appropriate sanction.

Here, the aggravating factor is as OSC contends; the offense is a major offense. Clearly the nature of Respondent's offense of continuing to run for partisan political office and his open, day-to-day campaigning for office when viewed under (1) and (5) above supports OSC's removal argument. His past employment record, recent accolades, and his long history of unblemished state government service do not support removal.

The mixed nature and character of the advice that he received, as discussed extensively above, cuts both ways. Respondent received no advice of counsel other than from OSC as discussed supra and infra. Clearly the advice of Dr. Kemp, no expert in such matters, is of little weight in supporting removal. While Servais was the DSS expert, he was, by his own admission, less expert than Respondent in

Hatch Act matters. This was demonstrated by Servais' apparent inability to grasp the very nuance that Respondent was raising regarding the language of the Act. Servais was less than articulate and never even provided Respondent with the proper information for determining Hatch Act coverage, i.e., that the funding mechanism for his position was irrelevant and that the proper test was whether Respondent's activities were in connection with activities that were federally funded. It was clear that Servais did not realize the irrelevance of the nuance Respondent was raising, for if he had, Servais would never have wasted the time to contact the DSS budget office to determine the funding mechanism for Respondent's position. As the DSS Hatch Act expert, he should have readily grasped the nuance, realized its irrelevance and so informed Respondent. Also, Respondent did have grounds to be suspicious of DSS' advice, and there is the taint of a "political prosecution" by the Michigan Department of Social Services. Servais' actions/ advice do not support removal.

In addition to the inept advice of the state officials with whom Respondent dealt, the other mitigating factor is the extensive effort that Respondent undertook to determine his coverage by the Act.

Regarding OSC's advice, OSC asks that Respondent be removed from office even though he sought advice from OSC to a simple question that OSC had within its wherewithal the ability to answer. Because it did not, OSC now seeks his removal from office. Because campaigning for political office is a serious offense, OSC argues **p. 69** that Respondent should be removed. OSC holds the unique position of being both advisor to and prosecutor of the very persons that it may advise. Because of this unique role, OSC holds the dual role of being both advisor to the public and its protector from political incursion in the civil service system. Here, the matter is one of equity as to whether OSC, which is tasked with these special responsibilities, remains unconstrained when seeking to prosecute an individual who was the "beneficiary" of its less than

adequate communication/advice. Simply put, OSC ought not to be able to seek removal of employees which it has inadequately advised or with whom it has dealt in a high-handed manner so as to preclude open communication. Certainly when OSC determines after the fact that a state employee has run for political office, OSC is faced with a fait accompli. Here, however, OSC was on notice early of Respondent' proposed actions. Subsequent to the time in April 1992 when Respondent first contacted Weintraub, OSC received Servais' letter in early June 1992, opened its investigation in late June and in July 1992 conducted a field investigation while Respondent was still running for office. Yet, in all that time, no one from OSC ever bothered to send Respondent anything in writing other than to send him a publication without cover letter. Yet, OSC had Respondent's address by at least early June. It would seem advisable that rather than allow a violation of the Act to occur, that a potential violation be nipped in the bud. Perhaps, OSC did not take this step because of the tone and content of Servais' June 3, 1992 letter. In this manner perhaps, DSS did color OSC's handling of the case. Likewise, contrary to what it did in Kelley, OSC never informed Respondent that if he were to cease and desist from further campaigning, he would not be prosecuted. Accordingly, OSC's actions do not support removal.

FINDINGS OF FACT

In addition to the stipulation of facts which is incorporated by reference herein, I find that

1. Beginning in April 1992, Respondent made extensive efforts to determine whether the Hatch Act covered him in his current position, where the federal funding involved reimbursements.

2. Respondent knew that the Hatch Act itself states that "an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency" may not

run for partisan political office, but as lay person, he reasonably questioned whether the Hatch Act applied to one whose position was funded by federal reimbursements.

3. As part of his effort, Respondent attempted to raise with both Dr. Kemp and Servais the issue of whether there is a **p. 70** distinction under the Hatch Act between state employees whose positions are funded by federal reimbursements as opposed to those whose positions are funded by federal grants and loans.

4. For reasons unknown, neither Dr. Kemp nor Servais provided Respondent with a meaningful response to his inquiry, but instead simply informed him that he was covered by the Hatch Act; as a result, Respondent continued to search for an answer to his question.

5. Respondent did not trust advice he received from DSS officials based on past and ongoing problems he had had with DSS.

6. At Servais' direction, Respondent contacted OSC and spoke on two separate occasions with an employee of OSC by the name of Heidi Weintraub.

7. Respondent questioned Weintraub regarding the issue of whether there is a distinction under the Hatch Act between state employees whose positions are funded by federal reimbursements as opposed to those whose positions are funded by federal grants and loans.

8. For reasons unknown, Weintraub never provided Respondent with a meaningful response to his inquiry regarding the distinction, and instead essentially dismissed his question while being rather curt and non-communicative.

9. Unbeknownst to Respondent, Weintraub was an attorney with OSC.

10. During at least one of their conversations, Weintraub did inform Respondent that he could not run for office

without violating the Hatch Act even if he were in a leave of absence without pay status.

11. Weintraub never explained to Respondent how/why the distinction between the funding mechanisms was an irrelevant legal standard for evaluating coverage under the Hatch Act.

12. During the second conversation, Weintraub did inform the Respondent that he could not run because the activities of his current position involved programs that were federally funded but did not inform Respondent that such was the relevant legal standard for determining... coverage.

13. One day after filing his petitions to run for partisan office and upon his own initiative, Respondent spoke with John Sorbet, a DSS employee and a person from whom Respondent felt he could get an honest answer.

14. Sorbet informed Respondent that the federal funding of his **p. 71** [Respondent's] position was made available to the Michigan DSS by so-called quarterly grant awards from the federal government.

15. Upon being informed of such information by Sorbet, a reasonably prudent person would have concluded that the federal funds paid to DSS were grants or would have inquired further regarding the implications of the quarterly grant awards vis a vis the Hatch Act.

16. Respondent made no such inquiry.

17. Beginning May 12, 1992, Respondent instead was willing to assume the risk of violating the Hatch Act because he was operating under the mistaken impression that the penalty to his agency for such violation was the cost of his salary for the approximate two months he was on leave ....

18. Servais sent a letter to OSC informing OSC of Respondent's actions on the very day and immediately after Servais learned that Respondent had been involved in the efforts to recall the state's governor.

19. [Then] OSC began to investigate Respondent including the completion of an investigative interview of Respondent during the midst of political campaign, but never informed Respondent if he were to cease and desist from further campaigning that it would drop its investigation.

20. Respondent has a long history of unblemished service to the State of Michigan and was recently commended for his work.

CONCLUSIONS OF LAW

For the period, May 12, 1992 through August 4, 1992, Respondent was an employee of the Michigan Department of Social Services. Respondent's position was funded in part by reimbursements/grants from the federal government and his activities as a DSS employee regarded programs which were federally funded. As such a DSS employee, Respondent was covered by the Hatch Act. During the period of time from May 12, 1992 through August 4, 1992, Respondent organized for, prepared to and did campaign for partisan political office. His actions in April and up to May 12, 1992, in attempting to determine his coverage were reasonable and responsible. His continuing to campaign after learning from an independent DSS source that his office was funded by so-called quarterly **grant** awards constituted a knowing assumption of risk that a reasonably prudent person would not have taken and thereby established a knowing and willful violation of the Hatch Act. The offense of campaigning for partisan political offense is a serious offense. Nevertheless, the actions of the Petitioner significantly contributed to **p. 72** Respondent's assumption of the risk and accordingly such assumption ought not be a basis for Respondent's removal.

ORDER

Upon consideration of this matter, I recommend that Respondent be found to be in violation of the Hatch Act as charged but that the Board impose no sanction.

Amended Comparison of MSPB's Decisions on Federal, State and Local Employees' Hatch Act Violations, Mitigating Circumstances, and Penalties by Robert Alexander, 2/24/98				Federal State Local Employe
Employee & Case No.	**Employee's violation**	**Employee's and/or MSPB's mitigating circumstances**	**MSPB Penalty Decision**	
Baker [75 M 155 '97]	partsn cand, OSC warn	good record, no discipl. action OSC agrmt suspd 90 days wop	rejected agreemt; but OSC made 2nd agmt, and informed Board after 90 days	federal
Bradford [71 M 441 '96]	partisan candidate	admitted charges, no hearing OSC agrmt suspd 90 days wop but also hold seat	reject OSC agreemt; OSC allowed her to retire; MSPB accept.	federal
Alexander [71 M 636 '96]	partisan candidate	tried to avoid violating Act, took Dept. offered 5 month lay-off, Dept rejected	**ordered removal**	**state**
took mandated 60 day unpaid campaign leave; called OSC twice before filing, asked if Medi federal funds was covered by **"loans or grants"** rule and for OSC to verify its opinion; OSC booklet didn't answer his specific questions; OSC gave him no **"official warning"** and did so OSC would drop its case; OSC misplaced his Trial Brief and 3" thick book of exhibits in consideration of case; MSPB did not send Trial Brief to Dist.Court with Adm. Record; the Objection to MSPB's Factual Findings due to 102 mistakes he identified; he has 24 years ment; he received a Medicaid Director's nomination as Outstanding Employee in 1995. Yet			caid employee "reimbursed" by did not verify its opinions; OSC not tell him about withdrawing OSC's basement during its Judge ignored his Formal of outstanding state employ- , MSPB found no mitigation.	
Reckard [69 M 130 '95]	partsn cand, OSC warn	he is retiring; settlement agreem't	'95 Bd reject agremt '97 Bd accept agrmt	federal

KEY PHRASES: "partsn cand" = partisan candidacy; "OSC warn" = OSC gave warning; "suspd 45 days wop" = suspended 45 days without pay;

Employee & Case No.	Employee's violation	Employee/MSPB mitigating circumst.	MSPB Penalty	Employee
Walker [67 M 271 '95]	partisan candidate	15 yrs employee, misunderst'd	suspd 30 days wop	federal
Andrezjwski [63 M495 '94]	partisan candidate	not run again, confused, fine record	suspd 45 days wop	federal
Rivera [61 M 436 '94]	partisan fund raising	sent out retractions as advised	suspd 60 days wop	federal
Murdock [61 M 403 '94]	partsn cand, OSC warn	none listed	**ordered removal**	**state**
Kelley [60 M 668 '94]	partsn cand, OSC warn	offered withdrawal, ran	**ordered removal**	**local**
Smith [60 M 176 '93]	partisan campaign	22 yrs empl., ended campaign	suspd 45 days wop	federal
Bianchi [59 M 282 '93]	partisan candidate	none listed	**ordered removal**	**state**
Blackburne [59 M 279 '93]	partisan candidate	no mitigating circumstances	**ordered removal**	**state**
Campbell [58 M 170 '93]	partsn cand, OSC warn	not defiant, tried to avoid violation	suspd 30 days wop	federal
Sprickard [58 M 108 '93]	partisan candidate	settlement agreement	rejected agreemt	**state**
Lee [58 M 81 '93]	partisan campaign	none listed	**ordered removal**	**Dist. Col.**
Jakiela [57 M 228 '93]	partsn cand, OSC warn	salary not federal funds	**ordered removal**	**county**
Fields [57 M 60 '93]	partisan candidate		**ordered removal**	**state**

Employee & Case No.	Employee's violation	Employee/MSPB mitigating circumst.	MSPB Penalty	Employee
Martellotta [56 M 488 '93]	partisan campaign	?	suspd 60 days wop	federal
Giles [56 M 465 '93]	partisan candidate	resign agreement approved	**case dismissed**	**state**
L. Williams [56 M 27 '93]	partisan candidate	confused as to coverage/ none	**ordered removal**	**state**
Winkler [56 M 213 '92]	partisan candidate	?	**ordered removal**	**state**
Dominguez [55 M 652 '92]	partisan candidate	?	**ordered removal**	**Dist. Col.**
Guyot [55 M 163 '92]	partisan campaign	cooperate, remorse, no hearing	suspd 60 days wop	**Dist. Col.**
Mahnke [54 M 13 '92]	indep. cand., OSC warn		**ordered removal**	**local**
Edenfield [52 M 327 '92]	partsn cand, OSC warn	24 yrs work, no discipline action	suspd 30 days wop	federal
Narcisse [51 M 222 '91]	partisan campaign	polling voter opinion/OSC didn't prove	**dismissed charges**	**federal**
Kehoe [46 M 112 '90]	partisan candidate	on leave, relied on Court decision	**ordered removal**	**state**
Carter [45 M 447 '90]	partisan candidate	?	**ordered removal**	**local**
Fergus [44 M 440 '90]	partisan campaign	?	**ordered removal**	**local**

Employee & Case No.	Employee's violation	Employee/MSPB mitigating circumst.	MSPB Penalty	Employee
Marstellar [44 M 111 '90]	partisan coercion	leniency due to being a whistleblower	decided no penalty	local
Dracup [44 M 107 '90]	partisan coercion	none listed	ordered removal	local
Termini [44 M 102 '90]	partisan coercion	none listed	ordered removal	local
Downing [44 M 99 '90]	partisan coercion	none listed	ordered removal	local
Gallagher [44 M 57 '90]	partisan coercion	none listed	ordered removal	local
Kruby, and Rung	partisan coercion			
Majure [43 M 511 '90]	indep. candidate	28 yr employee, no disciplinary	suspd 30 days wop	federal
Brondyk [42 M 333 '89]	partsn cand, OSC warn	Dist. Atty. advised not covered	ordered removal	county
Hamler [41 M 182 '89]	partisan candidate	?	ordered removal	county
Tracy [39 M 95 '88]	partisan candidate	?	ordered removal	state
Hendricks [39 M 9 '88]	partsn cand, OSC warn	?	ordered removal	state
Purnell, [37 M 184 '88]	partisan coercion	none listed	ordered removal	local
H. Johnson, and Fela	partisan coercion	none listed	ordered removal	local
Winkleman [3 M 692 '88]	partsn cand, OSC warn	?	ordered removal	state
Camillieri [35 M 170 '87]	OSC warn, ran partsn	?	ordered removal	state
M. Jones [35 M 81 '87]	partisan press conf.	?	suspd 30 days wop	federal

Employee & Case No.	Employee's violation	Employee/MSPB mitigating circumst.	MSPB Penalty	Employee
Biller, [32 M 110 '86]	partisan news article	on leave, union officers, articles	suspd 60 days wop	federal
Sombrotto, and Blaylock		not part of partisan campaign	suspd 60 days wop	federal
Carney [31 M 32 '86]	partsn cand, OSC warn	?	**ordered removal**	**federal**
Seastrunk [28 M 51 '85]	indep. cand, but 2 Dems	?	suspd 90 days wop	federal
Suso [26 M 673 '85]	partsn cand, OSC warn	?	**ordered removal**	**county**
Johnson [26 M 560 '85]	partsn cand, OSC warn	defiant, contemptuous	**ordered removal**	**federal**
Clause [26 M 556 '85]	partisan news article	no clear reason listed	suspd 45 days wop	federal
Zanjani [26 M 192 '85]	partisan fund raising	no clear reason listed	suspd 84 days wop	federal
Chidlow [21 M 504 '84]	non-partisan candidate	no clear reason listed	suspd 45 days wop	federal
Mahone [21 M 499 '84]	partisan candidate	?	**ordered removal**	**county**

Supreme Court, U.S.
FILED

(2)

No. 88-1668

In the Supreme Court of the United States

ROBERT D. ALEXANDER, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
WILLIAM KANTER
CARL E. GOLDFARB
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

MARY J. JENNINGS
General Counsel
MARTHA B. SCHNEIDER
Assistant General Counsel
ERIC D. FLORES
Attorney
Merit Systems Protection Board
Washington, D.C. 20419

QUESTIONS PRESENTED

1. Whether the Hatch Political Activity Act (Hatch Act), 5 U.S.C. 1501-1508, 7321-7326 (1994 & Supp. III 1997), violates the equal protection component of the Due Process Clause of the Fifth Amendment by providing different penalties for covered state and federal employees who engage in activity prohibited by the Act.

2. Whether the Hatch Act violates the due process guarantee of the Fifth Amendment by barring covered state employees, who work in federally financed state programs, from being candidates in a partisan election, although state law would otherwise permit them to run for office while in an unpaid leave of absence.

3. Whether the district court erred by granting the Merit Systems Protection Board's motion to affirm its final decision, after reviewing the decision not under the proper statutory standard of review.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Baca v. *King*, 92 F.3d 1031 (10th Cir. 1996)	20
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973)	13
City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983)	13
Davis v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989)	14, 15
Gade v. *National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992)	19
Girling Health Care, Inc. v. *Shalala*, 85 F.3d 211 (5th Cir. 1996)	20
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992)	13
Lujan v. *National Wildlife Fed'n*, 497 U.S. 871 (1990)	13
Minnesota Dep't of Jobs & Training v. *MSPB*, 875 F.2d 179 (8th Cir. 1989)	10, 19
Oklahoma v. *United States Civil Serv. Comm'n*, 330 U.S. 127 (1947)	16
Olenhouse v. *Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994)	6, 7, 20
Reno v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43 (1993)	13
Special Counsel v. *Baker*, 75 M.S.P.B. 155 (1997)	18
Special Counsel v. *Campbell*, 58 M.S.P.B. 170 (1993), aff'd, 27 F.3d 1560 (Fed. Cir. 1994)	18

Cases—Continued: Page

Special Counsel v. *Carney*, 31 M.S.P.B. 32 (1986) 18
Special Counsel v. *DeMeo*, 77 M.S.P.B. 158 (1997), appeal pending, No. 98-3132 (filed Fed. Cir. Jan. 26, 1998) 16-17
Special Counsel v. *Dominguez*, 55 M.S.P.B. 652 (1992) 18
Special Counsel v. *Edenfield*, 52 M.S.P.B. 327 (1992) 18
Special Counsel v. *Johnson*, 26 M.S.P.B. 560 (1985) 18
Special Counsel v. *Lee*, 58 M.S.P.B. 81 (1993) 12
Special Counsel v. *Malone*, 77 M.S.P.B. 477 (1998) 17
Special Counsel v. *Purnell*, 37 M.S.P.B. 184 (1988), aff'd *sub nom. Fela* v. *MSPB*, 730 F. Supp. 779 (N.D. Ohio 1989) 12
United Pub. Workers v. *Mitchell*, 330 U.S. 75 (1947) 16
United States Civil Serv. Comm'n v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) 19

Constitution, statutes and regulation:

U.S. Const.:
Amend. I 13
Amend. V (Due Process Clause) 8, 11
Amend. X 16
Hatch Political Activity Act, 5 U.S.C. 1501-1508, 7321-7326 (1994 & Supp. III 1997) 2, 10-11
5 U.S.C. 1501(4) 2, 19
5 U.S.C. 1502(a) 15
5 U.S.C. 1502(a)(3) 2, 19
5 U.S.C. 1504-1506 ..... 2, 14
5 U.S.C. 1505 12
5 U.S.C. 1505(2) 11
5 U.S.C. 1506 11
5 U.S.C. 1508 5

Statutes and regulation—Continued: Page

5 U.S.C. 7323(a) 15
5 U.S.C. 7323(b) (1994 & Supp. III 1997) 15
5 U.S.C. 7324(a) 15
5 U.S.C. 7325 (1994 & Supp. III 1997) 15
5 U.S.C. 7326 ..... 2, 11, 12, 14
5 U.S.C. 1212(f) 3
5 U.S.C. 1216(a)(2) 3
42 U.S.C. 1396 *et seq.* 2
42 C.F.R. 430.30(a)(1) 2

In the Supreme Court of the United States

No. 98-1662

ROBERT D. ALEXANDER, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 165 F.3d 474. The opinion of the district court (Pet. App. A21-A34) is unreported. The opinion of the Merit Systems Protection Board (Pet. App. A35-A44) is reported at 71 M.S.P.B. 636.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1999. The petition for a writ of certiorari was filed on April 14, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Hatch Political Activity Act (Hatch Act), 5 U.S.C. 1501-1508, 7321-7326 (1994 & Supp. III 1997), prohibits covered state and federal employees from being candidates for elective office. 5 U.S.C. 1502(a)(3). A state employee is generally covered by the Act if the employee's "principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency." 5 U.S.C. 1501(4). Because state Medicaid programs are funded in large part by federal grants, see 42 U.S.C. Subchapter XIX ("Grants to States for Medical Assistance Programs"); 42 C.F.R. 430.30(a)(1), state employees whose "principal employment is in connection with" a state Medicaid program are covered by the Hatch Act.

The Merit Systems Protection Board (MSPB or Board) is responsible for enforcing the Act. When a federal employee violates the Act, the employee must "be removed from his position, and funds appropriated for the position from which [he was] removed thereafter may not be used to pay the employee or individual." 5 U.S.C. 7326. "[I]f the [MSPB] finds by unanimous vote that the violation does not warrant removal," however, "a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board." 5 U.S.C. 7326. If the MSPB determines that a state employee violated the Act and that the violation warrants removal, the state employer must either (1) dismiss the employee and not rehire him for 18 months, or (2) forgo federal funds in an amount equal to two times the employee's annual pay. 5 U.S.C. 1504-1506.

2. Petitioner was employed by the Michigan Department of Social Services (DSS) as an analyst in the Medicaid program. Pet. App. A3. When petitioner learned that the incumbent state representative for his district did not intend to run for re-election, he decided to be a candidate in the 1992 Democratic Party primary for that seat. *Ibid.* Having had prior experience in partisan politics and some familiarity with the Hatch Act, petitioner knew that his candidacy would be unlawful if Medicaid was funded in whole or part by federal loans or grants. *Ibid.* However, because DSS employees referred to the Medicaid funding mechanism as a "reimbursement," petitioner thought that Medicaid might be said to be funded by federal "reimbursement" rather than grants or loans and thus outside the Hatch Act's coverage. *Ibid.*

Petitioner therefore sought information concerning his Hatch Act coverage—and was repeatedly told by everyone he asked that he was covered by the Act. He consulted Ed Kemp, his supervisor; Paul Servais, an employee in DSS's Human Resources office; and Heidi Weintraub, an attorney with the Office of Special Counsel (OSC), the federal agency charged with providing advice about the Hatch Act and prosecuting Hatch Act violations. Pet. App. A3-A4; 5 U.S.C. 1212(f), 1216(a)(2). Kemp told petitioner that he thought his position was covered by the Hatch Act. Pet. App. A3. Servais and Weintraub both told petitioner that he was covered by the Hatch Act and could not run for office. *Id.* at A3-A4. And Weintraub told petitioner unequivocally that he could not run for office even if he were on an unpaid leave of absence, and she sent him a copy of an OSC booklet on the Hatch Act. *Id.* at A4-A5. Petitioner said he did not find Servais' and Weintraub's explanations satisfactory because they

did not provide written verification or legal citations supporting their opinions. *Ibid.* Petitioner concluded that it was uncertain whether the Hatch Act applied to him and decided to "run and take a chance on an unclear situation." *Id.* at A5. At no time was petitioner ever told that he could be a candidate without violating the Hatch Act. *Ibid.*

Petitioner also was of the belief that the Hatch Act's forfeiture provision would not impose a significant penalty if he did violate the Act. In particular, petitioner assumed that DSS would be required to forfeit only twice the amount of salary he actually received during the campaign, an amount he was sure the agency would be willing to forfeit in order to retain his services. Pet. App. A5. Petitioner therefore took an unpaid leave of absence during the campaign as required by Michigan civil service law, and on May 12, 1992, filed his nominating petition to become a candidate. *Ibid.* The next day, he spoke to John Sorbet, a friend and DSS federal funding analyst who had been on vacation, to ask about Medicaid funding. *Ibid.* Sorbet informed petitioner that Medicaid is funded by a federal grant award. *Ibid.* Petitioner continued his candidacy nonetheless. During the campaign, petitioner met with an OSC investigator, who interviewed him and further explained the Hatch Act to him. *Id.* at A6. Petitioner continued his campaign. Petitioner lost the primary election. *Ibid.*

3. In July 1993, the OSC filed a complaint before the MSPB charging petitioner with violating the Hatch Act. Pet. App. A6. The MSPB assigned the case to an administrative law judge (ALJ), who permitted discovery and held a hearing. *Ibid.* The ALJ issued a recommended decision in July 1995, finding that petitioner violated the Hatch Act as charged. *Id.* at A45-A57.

The ALJ recommended that, although petitioner's violation was knowing and willful, petitioner not be removed from his job because OSC failed to take more active measures to dissuade him from violating the Act. *Id.* at A6-A7, A54.

The OSC filed exceptions to the recommendation, and the Board adopted the ALJ's recommended decision in part and rejected it in part. Pet. App. A35-A44. The Board found that petitioner violated the Hatch Act and that his violation warranted removal because it was knowing and willful. *Id.* at A6-A7, A39-A43. Moreover, unlike the ALJ, the Board was "not persuaded by [petitioner's] attempt to place the blame for his knowing violation of the Hatch Act on the failure of others to adequately dissuade him." *Id.* at A43. The Board therefore ordered that DSS could choose either to remove petitioner from his position or to forfeit federal funds in an amount equal to twice petitioner's annual salary. *Id.* at A7, A44. The Board further ordered that the same amount of federal funds would be withheld if petitioner was hired by a Michigan state or local agency within 18 months after his removal. *Ibid.* DSS terminated petitioner's employment in response. *Id.* at A7.[1]

4. Petitioner sought review of the Board's decision in district court pursuant to 5 U.S.C. 1508, Pet. App. A21, A24, and the Board filed a motion to affirm, *id.* at A21. The district court granted the Board's motion to affirm. *Id.* at A21-A34.

The district court concluded that the Board's decision was supported by substantial evidence and that the Board did not abuse its discretion in ordering peti-

[1] The termination did not take effect until January 1998 because petitioner obtained a stay. Pet. App. A7.

tioner's removal. The stipulated facts and petitioner's own admissions, the court explained, provided more than sufficient evidence. Pet. App. A29. As the court noted: "Alexander does not claim to have been unaware of the Hatch Act, and he was advised by authoritative sources that his candidacy would violate the Act. Nonetheless, he persisted in running." *Ibid.*[2]

The district court also rejected petitioner's argument that the Hatch Act violated his right to equal protection under the Constitution by providing different penalties for federal and state employees. First, the court held that petitioner lacked standing to raise an equal protection challenge to the penalty provisions because he was not harmed by the differences he sought to challenge; he therefore would receive no benefit from a ruling that differential punishments are unconstitutional. Pet. App. A32. The district court also rejected the contention that state employees are penalized more harshly than federal employees for Hatch Act violations. *Ibid.* Instead, the court explained, the Hatch Act could easily be read as penalizing federal employees more rigorously than state employees. *Ibid.* Federal employees who violate the Hatch Act must be penalized in some way, the court observed, whereas state em-

---

[2] Petitioner also moved for dismissal of the Board's motion to affirm, relying on *Olenhouse* v. *Commodity Credit Corp.*, 42 F.3d 1560, 1579 n.29 (10th Cir. 1994), which "specifically disapproved" of the practice of filing motions to affirm in administrative review proceedings. Pet. App. A24 n.5. The court denied the motion, distinguishing *Olenhouse* because the motion at issue in that case invited the reviewing court to rely on evidence outside the administrative record. *Ibid.* The court also noted that the Sixth Circuit had not adopted *Olenhouse* but concluded that, in any event, the case was not applicable where, as here, the agency relies solely on the administrative record. *Ibid.*

ployees whose violations do not warrant removal receive no penalty. Moreover, the Hatch Act permits state agencies to forfeit federal funds rather than impose a removal ordered by the MSPB. *Ibid.* In any event, the court concluded, the differential penalty scheme was not implicated in this case. "Because the Board determined that [petitioner's] violation warranted removal, it could not have imposed any lesser penalty even if [petitioner] had been a federal employee." *Ibid.*[3]

5. Petitioner appealed and the court of appeals affirmed. Pet. App. A1-A20. The court of appeals first rejected petitioner's claim that the district court had erred by deciding the case on summary judgment. *Id.* at A9. Petitioner argued that the Tenth Circuit had disapproved of the use of summary judgment procedures and motions to affirm in appeals from agency decisions under the Administrative Procedure Act in *Olenhouse* v. *Commodity Credit Corp.*, 42 F.3d 1560, 1579 n.29 (1994), because such procedures allegedly invite improper consideration of evidence outside the administrative record and reliance upon post hoc rationalizations. The court of appeals, however, determined that *Olenhouse* was inapplicable in this case because the Board's motion relied on the proper standard of review, did not seek to introduce extra-record evidence, and did not rely on post-hoc rationalizations. Pet. App. A9.

The court of appeals also rejected petitioner's claim that the Hatch Act violates the equal protection com-

---

[3] Although the Hatch Act does not define when removal is warranted, the Board, in construing the Act, has applied the same factors to determine whether a violation by a state or federal employee warrants removal. Pet. App. A17.

ponent of the Due Process Clause by imposing differential sanctions on state and federal employees who violate the Act. Pet. App. A15-A20. It was true, the court explained, that the minimum sanction available under the Act for state employees was removal, whereas there were lesser sanctions available for federal employees. But that did not amount to discrimination against state employees, because neither a federal employee nor a state employee will be removed from his position unless the misconduct meets a particular standard of culpability, and that standard is identical for both state and federal employees. *Id.* at A17. Consequently, the primary difference between the treatment of state and federal employees under the Act identified by petitioner was that, if a state employee's misconduct does not warrant removal, no sanction at all may be imposed; in contrast, if a federal employee's misconduct does not warrant removal, lesser sanctions still must be imposed. *Id.* at A17-A18.[4]

That difference—the fact that misconduct by state employees that does not warrant removal goes unpunished, whereas identical conduct by federal employees may result in punishments other than removal—and the other differences in the penalty provisions, the

[4] The court also noted that since the Board found petitioner's willful violation warranted removal, the penalty would have been the same even if he had been a federal employee. Pet. App. A18. The court further noted that "it was for this reason" that the district court found that petitioner did not have standing to assert an equal protection challenge. *Id.* at A18 n.9. The court concluded: "While we agree that [petitioner] could have not have been adversely affected by the omission of suspensions from the statutory penalties available for violations by covered state employees, we simply conclude that he has failed to demonstrate he was deprived of equal protection." *Ibid.*

court of appeals concluded, survive rational basis scrutiny. Pet. App. A18-A19. The Hatch Act, the court of appeals explained, applies to a broader range of political activities for covered federal employees than for covered state employees. *Id.* at A18. Moreover, the federal government's interest as an employer, in promoting government effectiveness and fairness, deterring improper political influence or the appearance of political influence, and in awarding merit rather than political performance, differs from its interest, as a provider of funds to States, in removing partisan political influence from the administration of those federal funds. *Id.* at A19. The different considerations, the court of appeals concluded, "could provide a rational basis for the different statutory penalty provisions for federal employees and covered state and local agency employees who violate the Hatch Act." *Ibid.* The court of appeals also rejected petitioner's claim that the MSPB applied the Hatch Act more harshly against state employees than federal employees, concluding that the case-specific nature of penalty determinations provided a reasonable basis for the different outcomes in individual cases. *Id.* at A20.[5]

---

[5] The court rejected petitioner's "subjective compilation" of Board decisions since 1994. Pet. App. A20. While petitioner had asserted that 21 of 30 state or local employees were removed from their positions as a result of the Board's decisions, and only three of 22 federal employees were removed for the same violations, the court concluded that most of the cases involving federal employees were not comparable to petitioner's case because they involved non-final decisions, involved conduct not prohibited for covered state employees, or were settled by agreement. *Ibid.* Only seven of the 22 cases actually decided by the Board involved federal employees who engaged in partisan and fund raising activities that were also prohibited for state employees. *Ibid.* Of those seven, four employees were suspended and three were removed. *Ibid.*

Finally, the court rejected petitioner's argument that employees on a mandatory unpaid leave of absence under Michigan law must be excepted from the coverage of the Hatch Act. Pet. App. A11-A12. Following the Eighth Circuit's decision in *Minnesota Department of Jobs & Training* v. *MSPB*, 875 F.2d 179, 183 (1989), the court of appeals concluded that the Hatch Act applies without regard to an employee's leave status. Pet. App. A12. Quoting the Eighth Circuit's decision, it explained:

> [T]he legislative history of the provisions of the Act makes it unmistakably clear that covered state employees are subject to the prohibitions of the Act regardless of leave status. During hearings on a proposal to extend the Hatch Act to state and local government employees, Congress specifically considered and rejected a provision which would have exempted from the Hatch Act's prohibitions those candidates who had taken a leave of absence without pay. 86 Cong. Rec. 2872-75 (1940).

Ibid. (quoting 875 F.2d at 183).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Accordingly, it does not warrant further review.

1. Petitioner first argues that the Hatch Political Activity Act (Hatch Act), 5 U.S.C. 1501-1508, 7321-7326

The three federal employees who were removed were similarly situated to petitioner in that they were also found to have deliberately violated the prohibitions on partisan candidacy. *Ibid.* Accordingly, the court rejected petitioner's differential treatment argument as meritless. *Ibid.*

(1994 & Supp. III 1997), which prohibits certain political activities by covered federal employees and covered state employees working in federally funded programs, violates the equal protection component of the Due Process Clause of the Fifth Amendment because it provides different penalties for state and federal employees who commit violations. Pet. 12-14, 18-20. But this case does not present that question; petitioner lacks standing to raise it; and the contention lacks merit in any event.

a. Petitioner's primary complaint seems to be that the Hatch Act provides only one remedy, removal from office, for state employees who violate the Act, while federal employees may be subject to a range of remedies. See Pet. 12. The Hatch Act, however, imposes a mandatory sanction of removal for federal employees and state employees alike *whenever* those employees commit a violation that, like petitioner's, is sufficiently serious to warrant removal.[6] And, as the court of appeals observed, Pet. App. A17, the MSPB employs the same test to determine whether a Hatch Act violation warrants removal whether the case involves a federal or state employee—it asks whether the violation was serious and occurred under circumstances demonstrating a deliberate disregard of the law,

---

[6] In particular, a federal employee who violates the Act must "be removed from his position" unless "the [MSPB] finds by unanimous vote that the violation does not warrant removal." 5 U.S.C. 7326. Similarly, where a state employee violates the Act, the MSPB must "determine whether the violation warrants the removal of the officer or employee." 5 U.S.C. 1505(2). Where the MSPB determines that removal is warranted, the state employer must either dismiss the employee or forgo an amount of otherwise available federal funds equal to two times the employee's annual pay. 5 U.S.C. 1506.

considering all the aggravating and mitigating factors. Compare *Special Counsel* v. *Lee*, 58 M.S.P.B. 81, 91 (1993) (construing Section 7326, the provision governing removal of federal employees), with *Special Counsel* v. *Purnell*, 37 M.S.P.B. 184, 200 (1988) (construing Section 1505, the provision governing removal of state employees), aff'd *sub nom. Fela* v. *MSPB*, 730 F. Supp. 779 (N.D. Ohio 1989).

Because the Board found that petitioner's violation here was willful and aggravated—he was repeatedly warned that his conduct would violate the Hatch Act and persisted nonetheless—the sanction of removal would have been imposed (and would have been mandatory) even if petitioner had been a federal employee. Pet. App. A18; see also *id.* at A32 ("Because the Board determined that [petitioner's] violation warranted removal, it could not have imposed any lesser penalty even if [petitioner] had been a federal employee."). Consequently, petitioner was not "adversely affected by the omission of suspensions" and lesser penalties "from the statutory penalties available for violations by covered state employees." *Id.* at A18 n.9. Simply put, if the same penalty provisions applicable to federal employees were made applicable to state employees, petitioner still would have been ineligible for any of the lesser penalties, and removal still would have been mandatory. *Ibid.*

Because petitioner was not treated differently from a similarly situated federal employee, this case does not present the question whether providing different penalties for state and federal employees who violate the Hatch Act is inconsistent with equal protection. For the same reason, petitioner lacks standing to raise the issue. Petitioner cannot show that any differences in the Hatch Act's penalty provisions caused him to

suffer an injury in fact, or that a favorable decision on his challenge to the alleged differences would redress his injury. He thus cannot meet "the irreducible constitutional minimum" requirements necessary to establish "standing" to raise his equal protection claim. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973). It is precisely such a challenge that petitioner seeks to raise here. Pet. App. A33.[7]

b. Petitioner's equal protection claim is, in any event, without merit. As the district court pointed out, Pet. App. A32, the Hatch Act in many respects provides for more lenient treatment of state employees. A

---

[7] Nor can petitioner argue that he may be subjected to differential treatment in the future. To the contrary, because petitioner will not be subjected to any sanctions unless he violates the Hatch Act again, and he nowhere indicates that he intends to do so, any claim based on the speculative possibility of a future application is too remote to be ripe. Cf. *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58-59 (1993) (mere passage of statute does not give complainant a ripe claim absent agency action "applying the regulation to him"); *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("[A] regulation is not ordinarily considered the type of agency action 'ripe' for judicial review [absent] some concrete action applying the [challenged provision] to the claimant's situation in a fashion that harms or threatens to harm him."); *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983) (individual who cannot show he is likely to be a victim of the allegedly unconstitutional policy lacks standing to sue for injunctive relief). Likewise, petitioner's challenge cannot be justified under a First Amendment overbreadth theory. Petitioner challenges only the differences in the *penalties* applicable to otherwise properly proscribed conduct. As a result, petitioner cannot argue that the distinctions he seeks to challenge chill protected conduct.

federal employee who violates the Hatch Act *must* be removed from his position unless the MSPB "finds *by unanimous vote* that the violation does not warrant removal." 5 U.S.C. 7326 (emphasis added). In contrast, a state employee who violates the Act can escape removal if a *simple majority* of the MSPB agrees that the violation does not warrant removal; there is no unanimity requirement for state employees. Moreover, even if the MSPB concludes that removal is warranted for a state employee, the state agency can decline to remove the employee if it is willing to forgo federal funds equal to two times the employee's annual pay. 5 U.S.C. 1504-1506. Federal employees must be removed as a matter of law. Finally, even where removal of a federal employee is not warranted, the employee still must be subjected to some sanction for the violation; state employees whose violations are not sufficiently serious to warrant removal, in contrast, are subjected to no sanction at all. 5 U.S.C. 7326. Petitioner, a state employee, surely cannot be heard to claim that his rights are violated by more favorable treatment of state employees.

Any differences in the penalties applicable to state and federal employees, moreover, easily pass muster under the rational basis test, which petitioner concedes to be the applicable standard here. See Pet. 11-12.[8]

---

[8] *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989), does not support petitioner's contention that a statutory distinction between federal and state employees would run afoul of the equal protection guarantee. In *Davis*, the Court invalidated a Michigan statute that exempted retirement benefits paid by the State and localities within the State, but not similar benefits paid by the federal government, from state income taxes. The court concluded that the Michigan statute violated the intergovernment tax immunity doctrine, and noted that traditional equal protection

The Hatch Act prohibits a broader range of activities for federal employees than for state employees.[9] Congress therefore may rationally have concluded that a broader range of penalties for federal employees was warranted as well. In addition, Congress's interest in regulating the conduct of state employees working in federally funded programs and its interest in regulating the activities of its own employees are somewhat different. Because a federal employee's conduct directly affects the effectiveness, efficiency, and public perception of the federal government, while a state employee's conduct does not, Congress could have reasonably determined that every Hatch Act violation by a federal employee must be punished in order to maintain the federal government's proper functioning and public confidence in it, but that only the most egregious violations by a state employee—those warranting removal—must be punished to ensure that the State administers federal funds in accordance with federal

---

analysis was not applicable to the question before the Court. *Id.* at 816-817.

[9] The Hatch Act prohibits federal employees from: (1) using official authority or influence to affect an election; (2) knowingly soliciting, accepting, or receiving a political contribution, with certain exceptions; (3) running for partisan office, with certain exceptions; (4) knowingly soliciting or discouraging political participation by a person having dealings with the employee's office; and (5) engaging in political activity while on duty in a federal facility, in uniform, or using a government vehicle. 5 U.S.C. 7323(a), 7324(a), 7325 (1994 & Supp. III 1997). Certain federal employees may not take an active part in political management or political campaigns. 5 U.S.C. 7323(b) (1994 & Supp. III 1997). By contrast, the Hatch Act prohibits state employees only from: (1) using official authority or influence to affect an election; (2) knowingly soliciting, accepting, or receiving a political contribution; and (3) running for partisan political office. 5 U.S.C. 1502(a).

mandates. Cf. *United Pub. Workers* v. *Mitchell*, 330 U.S. 75, 99-100 (1947) (the Hatch Act reasonably limits the political activities of federal employees to promote federal government efficiency); *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947) (Hatch Act as applied to state employees does not violate the Tenth Amendment because it was appropriate and plainly adapted to the federal exercise of spending power). Moreover, because the federal government, acting as employer, may directly impose removal or suspension upon its own employees, but relies on its spending power to influence the employment decisions of the States, Congress could reasonably have concluded that imposing finely tuned punishments for minor infractions committed by its own employees is appropriate, but that encouraging the States to impose such minor punishments through the spending power would prove too cumbersome to be efficacious and too burdensome to be worthwhile.

Finally, Congress also could reasonably have determined that the penalty imposed on petitioner, *i.e.*, removal and 18-month debarment or the forfeiture of significant federal funding, was necessary to ensure state employees' compliance with the Hatch Act. Petitioner's conduct demonstrates the reasonableness of that decision. He was perfectly willing to violate the Hatch Act when he believed that DSS's financial penalty, if it chose not to remove him, would amount to only two months of his salary—twice the amount of salary he received during the campaign, taking into account his leave of absence—an amount he believed the agency would willingly forfeit.[10]

---

[10] Petitioner also asserts (Pet. 25-30) that the MSPB's decision in *Special Counsel* v. *DeMeo*, 77 M.S.P.B. 158 (1997), appeal

c. Alternatively, petitioner appears to argue that the MSPB has applied the Hatch Act in a fashion that discriminates against state employees. In particular, petitioner argues that the MSPB has ordered harsher

---

pending, No. 98-3132 (filed Fed. Cir. Jan. 26, 1998), further supports his equal protection claim. In *DeMeo*, the MSPB held that the Hatch Act does not require federal employees who are dismissed for violating the Act to be debarred from re-employment following their removal. *Id.* at 174. In contrast, petitioner points out, the Act provides that, if a State attempts to evade the removal sanction by rehiring the employee to work on a federally funded program within 18 months of removal, it can lose funding in an amount equal to two years of the employee's salary. Petitioner, however, did not make that argument below—he cited *DeMeo* for the first time *after* argument in the court of appeals, and then only as a supplemental authority, even though *DeMeo* was decided before petitioner filed his opening brief—and *DeMeo* is hardly settled law. The case is currently under review, and the Director of the Office of Personnel Management has requested reconsideration of *DeMeo's* holding in *Special Counsel* v. *Malone*, 77 M.S.P.B. 477 (1998), which followed *DeMeo;* that request for reconsideration is still pending. *DeMeo*, in any event, does not support petitioner's equal protection claim. Even if the Hatch Act prevented States from circumventing the removal requirement by debarring state employee violators from federal-fund-related jobs for 18 months and did not impose a similar debarment period on federal employees, that difference would easily survive rational basis scrutiny. That federal agencies are permitted to rehire employees removed from service for violations of the Act does not mean they will choose to do so. And, given the legislative and other forms of oversight (*e.g.*, control through appropriations) to which federal agencies are subject, there is every reason to believe that they would not so undermine the Hatch Act's penalty provisions. Since Congress does not exercise similar oversight powers with respect to state agencies, Congress could rationally have concluded that an express debarment provision was necessary to prevent state agencies from circumventing removal requirements by rehiring removed employees.

penalties for state employees than it has for similarly situated federal employees. Pet. 15-16.

The court of appeals properly rejected that highly fact-intensive contention. See Pet. App. A20. The MSPB in fact has ordered removal in cases involving federal employees who, like petitioner, deliberately violated the prohibition on partisan candidacy. See, *e.g.*, *Special Counsel* v. *Dominguez*, 55 M.S.P.B. 652 (1992); *Special Counsel* v. *Carney*, 31 M.S.P.B. 32 (1986); *Special Counsel* v. *Johnson*, 26 M.S.P.B. 560 (1985). And the cases upon which petitioner relies to show that federal employees are treated more leniently are all distinguishable based on the employee's relative culpability, by the fact that the penalty was imposed by reason of a compromise in settlement, or because of other individualized considerations. See Pet. App. A20. Indeed, after examining the cases petitioner relied upon to support his claim of unequal treatment, the court of appeals found his claim to be without merit. *Ibid.*[11]

---

[11] For example, petitioner argues that the Board ordered suspensions in three cases involving federal employees who deliberately violated the prohibition on partisan candidacy—*Special Counsel* v. *Baker*, 75 M.S.P.B. 155 (1997); *Special Counsel* v. *Campbell*, 58 M.S.P.B. 170 (1993), aff'd, 27 F.3d 1560 (Fed. Cir. 1994); and *Special Counsel* v. *Edenfield*, 52 M.S.P.B. 327 (1992). See Pet. 15, 24. In *Baker*, however, the action was dismissed, the Hatch Act complaint was not adjudicated, and no penalty issues were addressed. 75 M.S.P.B. at 156. In *Edenfield*, the Board adopted a settlement agreement in which OSC and the employee agreed to a 30-day suspension. 52 M.S.P.B. at 329. And in *Campbell*, the Board found that the employee's violation did not warrant removal even though OSC had warned him against running, because the employee's agency ethics officer had told him that his candidacy would *not* violate the Hatch Act. 58 M.S.P.B. at 182-183. Petitioner, in contrast, was told by *everyone* that he could not be a

2. Petitioner also claims that the Hatch Act violates due process as applied to Michigan state employees. Pet. 16-18. In particular, petitioner notes that Michigan law does not prohibit state employees from running for political office so long as they take an unpaid leave of absence during their candidacy. The Hatch Act, in contrast, provides no such exception for covered state employees working in federally funded programs, see 5 U.S.C. 1501(4), 1502(a)(3), and the legislative history demonstrates that Congress expressly considered, but rejected, exceptions for employees who take unpaid leave. As the only other court of appeals that has addressed this issue held, "it is clear from the statute and the legislative history that a covered state employee is prohibited from running for public office in a partisan election, even if on approved leave without pay." *Minnesota Dep't of Jobs & Training* v. *MSPB*, 875 F.2d 179, 183 (8th Cir. 1989) (en banc); see also *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 572-573 n.18 (1973).

In essence, petitioner argues that Michigan's civil service law, which permits employees to run for office while on an unpaid leave of absence, must supersede the Hatch Act with respect to covered state employees working on federally funded projects. But that turns the law of pre-emption on its head. So long as Congress legislates in areas within its constitutional powers—as it does when it attaches appropriate conditions to federal funding—federal law supersedes inconsistent state laws. *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992). And, although petitioner asserts that such pre-emption in this context violates

---

candidate without violating the Hatch Act, but he decided to become a candidate nonetheless.

due process, he cites no legal authority supporting that assertion.

3. Finally, petitioner argues (Pet. 22-23) that the court of appeals' decision to permit this case to be resolved through a motion to affirm conflicts with the Tenth Circuit's decision in *Olenhouse* v. *Commodity Credit Corp.*, 42 F.3d 1560 (1994). That assertion is mistaken. In *Olenhouse*, the Tenth Circuit disallowed the use of summary judgment in administrative review proceedings, even when framed as a motion to affirm, on the theory that it invites the consideration of extra-record evidence and post-hoc rationalizations in violation of the standard of review set out in the Administrative Procedure Act. 42 F.3d at 1579-1580. Since *Olenhouse*, however, the Tenth Circuit has clarified that, even where the district court uses the label "summary judgment" to describe its decision, the district court's order will not be reversed for that reason if it applies the correct standard of review and does not entertain extra-record evidence or justifications. *Baca* v. *King*, 92 F.3d 1031, 1034 n.1 (1996).

In this case, the court of appeals found it unnecessary to decide whether to adopt the *Olenhouse* rule because the district court in fact had relied only on record evidence and had applied the correct standard of review. The Fifth Circuit likewise found it unnecessary to decide whether to follow *Olenhouse* where, as here, the district court grants an agency's motion to affirm after reviewing the administrative record under the appropriate standard. *Girling Health Care, Inc.* v. *Shalala*, 85 F.3d 211, 214 (1996). Because those decisions are consistent with *Olenhouse* and the Tenth Circuit's treatment of *Olenhouse* in *Baca*, they do not give

rise to a conflict in circuit authority warranting this Court's review.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
WILLIAM KANTER
CARL E. GOLDFARB
Attorneys

MARY J. JENNINGS
General Counsel
MARTHA B. SCHNEIDER
Assistant General Counsel
ERIC D. FLORES
Attorney
Merit Systems Protection Board

JULY 1999

---

[12] Petitioner also claims that the district court should have held a hearing to determine whether the administrative record it was sent in fact was complete. Pet. 22. Petitioner, however, does not explain what was omitted from the record, how the omission prejudiced him, or why the omission could not have been corrected through a motion to supplement containing copies of the omitted administrative agency record materials. In any event, petitioner's claims concerning the state of the record transmitted to the district court are fact-bound and do not warrant this Court's review.

Supreme Court, U.S.
FILED
JUL 23 1999
OFFICE OF THE CLERK

No. 98-1662

In The
Supreme Court of the United States

October Term, 1998

ROBERT D. ALEXANDER,

Petitioner,

vs.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION
with Appendix

GEORGE V. WARREN
Counsel of Record
847 W. Willow, Nandy House
Lansing, Michigan 48906
(517) 484-5050

Attorney for Petitioner

July 23, 1999

QUESTIONS PRESENTED FOR REVIEW

I. Whether state employee Petitioner's right to Equal Protection was violated by the unequal and more severe penalty imposed on state and local employees, **removal with an eighteen month debarment**, being 5 U.S.C. §1505 (2) and §1506 (a)(1) and (2), *versus* the lesser penalties for federal employees, **varying from removal with no debarment to suspension without pay for not less than 30 days**, being 5 U.S.C. §7326, for the same violation of the Hatch Political Activity Act (Hatch Act or the Act) -- candidacy for partisan elected position? This question is crucial in that the federal Administrative Law Judge recommended that Petitioner not be penalized after hearing three days of testimony, especially due to improper actions or inactions by the Office of Special Counsel (OSC), the prosecutorial arm of the Act.

II. Whether Petitioner State Employee's right to Due Process was violated by the Merit Systems Protection Board (MSPB or the Board) refusal to recognize the sanctity of Michigan's civil service mandated 60-day unpaid leave for partisan candidacy?

III. Whether Petitioner's request for an Olenhouse Hearing on his Motion to Dismiss should have been granted by the District Court?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Citations to Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Reply Statement to New Points Raised in the Brief in Opposition	2
1. Respondent purposely misstated the Board's order to the state to "dismiss" its employee instead of "remove," the statutory word that appears three times in the cited sections.	2
2. Respondent purposely misstated Petitioner's challenge to the Board's suspension of three federal employees after the OSC formally warned each not to violate the Hatch Act again.	2
3. Respondent erred in several crucial assertions against Petitioner.	5
4. Respondent's Brief in Opposition did not conform to Supreme Court Rules requiring accurate statements and tried to hinder the Court's consideration of Petitioner's clear and verified appeal.	6
ARGUMENT	7
1. The Board's pattern and practice clearly refutes Respondent's misstatements that the Board	
a. decides harsher penalties for federal employees,	
b. Could not have imposed a lesser	

penalty on Petitioner if he had been a federal employee, and
c. Has an identical standard of culpability for both federal and state employees. 7
2. Respondent purposely reiterates factual misstatements by the Board, District Court, and Appeals Court, which Petitioner correctly and extensively documented in initial briefs to the District and Appeals Courts. 9
3. Respondent purposely misstates significance of the different *Olenhouse* interpretations by the Fifth, Sixth and Tenth Courts of Appeals. 10

CONCLUSION 10

APPENDIX F - Citation of Supplemental Authority filed October 23, 1998, in U.S. Court of Appeals for the Sixth Circuit A 1

APPENDIX G - Petitioner's Formal Objections to MSPB's Factual Findings in Final Decision filed March 27, 1997, in U.S. District Court for the Western District of Michigan, and filed March 4, 1998, in U.S. Court of Appeals for the Sixth Circuit A 4

TABLE OF AUTHORITIES

U.S. Constitutional Amendment **Page**

5th Amendment 1
14th Amendment 1

Federal Statutes

Hatch Political Activity Act,
5 U.S.C. § 1501 et. seq. i, 1, 2
5 U.S.C. § 7321 et. seq. i, 1, 2

Title 28, U.S.C. § 1254(1) 1

Fed. Railroad Adm. Drug Testing Program Regulations
49 C.F.R. Ch. VI, § 635.25-.37 2

Federal Cases

Olenhouse v. Commodity Credit Corp.,
42 F. 3d 1560 (10th Cir. 1994) i, 10

M.S.P.B. Decisions

All MSPB Decisions ordering penalties during 1984-97 are listed in chronological order in Appendix E at A 58. MSPB decisions cited in the Reply Brief are:

Special Counsel v. Alexander (Appendix C at A 35)
[71 M.S.P.R. 636 (1996)] 1-10

S. C. v. Andrezjwski [63 M.S.P.R. 495 (1994)] 7, 8, 10

S. C. v. Baker, [75 M.S.P.R. 155 (1997)] 3-4, 6-8

S. C. v. Bradford, [71 M.S.P.R. 441 (1996)] 7, 8, 10

S. C. v. Campbell [58 M.S.P.R. 170 (1993)] 3, 6-8

S. C. v. Camey, [31 M.S.P.R. 32 (1986)] 7

S. C. v. DeMeo, [77 M.S.P.R. 158 (1997)] 5-6

S. C. v. Dominguez, [55 M.S.P.R. 652 (1992)] 7

S. C. v. Edenfield, [52 M.S.P.R. 327 (1992)] 3, 6-8

S. C. v. Johnson, [31 M.S.P.R. 32 (1986)] 7

S. C. v. Purnell, [37 MSPR 184 (1988)] 5

S. C. v. Reckard [77 M.S.P.R. 651 (1998)] 7, 10

S. C. v. Walker, [67 M.S.P.R. 271 (1995)] 7, 8, 10

PETITION FOR WRIT OF *CERTIORARI*

Petitioner, Robert Alexander, respectfully requests that a writ of *certiorari* be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case filed on January 21, 1999.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. A1 - A20) is reported at 165 F.3d 474. (File: 99a0020p.06) The opinion of the United States District Court for the Western District of Michigan is unreported (Pet. App. A21 - A34). The final decision and order of the United States Merit Systems Protection Board (Pet. App. A35 - A44) is reported at 71 M.S.P.R. 636. The recommended decision of the federal administrative law judge is unreported (complete copies of the 72 page decision were lodged in with the Clerk of the Supreme Court; pages 56-57, 63, 65-72 are in Pet. App. A45 - A57).

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1999. The petition for a Writ of *Certiorari* was filed on April 14, 1999. The Brief for the Respondent in Opposition was filed July 14, 1999. This Court has jurisdiction pursuant to Title 28, United States Code §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- Fifth Amendment to the United States Constitution.
- Fourteenth Amendment to the United States Constitution.
- 5 U.S.C. §7326, Hatch Act federal employee penalty.
- 5 U.S.C. §1505 and 1506, Hatch Act state and local employee penalty.

REPLY STATEMENT TO THE NEW POINTS RAISED IN THE BRIEF IN OPPOSITION

1. Respondent purposely misstated the Board's order for the State to "dismiss" its employee instead of "remove," the statutory word that appears three times in the cited sections, 5 U.S.C. §1505(2) and 1506(1) and (2).

Congress, the Courts, and the Solicitor General are familiar with the various procedures contained in the word "remove," which are vastly less punitive than "dismiss," which was used in the Respondent's biased explanation of the state employee's penalty. Res. 2, line 29. The Board has interpreted "remove" to mean "dismiss" for federal employees. The Board has applied its federal employee "dismiss" interpretation to state employees, although the Act §1508 requires the suspension of the state employee during the appeal process.

The recent Federal Railroad Administration Drug Testing Program Regulations explained "removed" as temporarily precluded "from performing his or her safety-sensitive function" while able to do other work and take drug counseling, and "evaluation and rehabilitation" while working, or during a suspension and then return to work. (49 CFR Ch. VI, §653.25-.37) The Solicitor General's explanation limiting the State's options to "dismissing" its employee or foregoing federal funds is inaccurate and misleading. Per §1508 the State should have suspended Petitioner without pay for the 18 month penalty period while Petitioner appealed his suspension to the District Court and Circuit Court of Appeals, and satisfied the "removal" order of the Merit Systems Protection Board, §1505(2).

2. Respondent purposely misstated Petitioner's challenge to the Board's suspension, instead of the dismissal penalty suffered by Petitioner, of three federal employees who were formally warned not to violate the

Hatch Act again, and each disregarded the formal warning by conducting another partisan candidacy.

The essence of Petitioner's major challenge to the Board's unconstitutional pattern and practice of enforcing the Hatch Act is that the Board orders the removal of state employees who commit the same violation of the Act as federal employees, for whom the Board usually orders only a 30-90 day suspension. The Board's arbitrary and capricious pattern is best demonstrated in its handling of three federal employees that Respondent mistakenly described near the end of its Brief: *SC v Baker,* 75 M.S.P.R 155; *SC v Campbell*, 58 M.S.P.R. 170; and SC v *Edenfield*, 52 M.S.P.R. 327. Res. 18, footnote 11. All were elected partisan candidates: Baker before federal employment in 1993, and Campbell and Edenfield after years in federal service. The OSC formally warned Campbell and Edenfield that their campaigns violated the Act and they should not run again; Baker was warned by the Veteran Administration upon employment that she could not run again without violating the Act. Yet, despite the OSC's and VA's formal warnings, all ran again in partisan campaigns!

Amazingly, the OSC did not demand that the Board order dismissal for these federal employees who violated the Act a second time after being formally warned about violations. Instead, OSC crafted settlement agreements for suspensions (Baker 90 days; Campbell and Edenfield 30 days each), and the agreements were mistakenly supported by the Administrative Law Judge. The Board rightly rejected the Baker agreement and remanded it back for further proceedings in 1995, but did approve the suspensions for Campbell and Edenfield. The Board's statements in each of these three decisions demonstrate the arbitrary and capricious nature of its decisions, and highlight the dismal summations the Respondent provided in footnote 11.

Respondent's footnote ignored the fact that all three

were formally warned. The degree to which Respondent clearly neglected pertinent facts is verified in its statement that "In Baker...the action was dismissed, the Hatch Act complaint was not adjudicated, and no penalty issues were addressed." The extent Respondent misstated the *Baker* case is established by Board member Amador's concurring opinion to the Board's 1997 *Baker* decision:

> In a unanimous 1995 opinion, the Board rejected the CALJ's recommended decision...[the] Act precluded [the Board] from accepting...that removal is not warranted and that a 90 day suspension is appropriate...For whatever reason (and I suspect that the parties realized that this case lacked any mitigating circumstances beyond the...factors which had been previously recognized by...the Board), the parties entered into another settlement agreement. This time, however, they did not seek to have the Board enter the ...agreement into the record for enforcement. Instead, they merely filed a motion to dismiss the complaint with prejudice....I **believe that the Special Counsel's exercise of this discretion in the instant case calls into question her commitment to the mandate of the Hatch Act....**
>
> Off the football field, an end run is defined as an **"evasive trick." I can find no better definition for the Special Counsel's action in this case**. Faced with a clear and knowing violation of the Hatch Act and aware...the Board would not accept a penalty short of removal unless there were additional mitigating factors that had not been previously entered into the record, **the Special Counsel has abrogated her responsibility under the Hatch Act**...the Board lacks the power to negate this decision or to take any action other than a dismissal of the complaint... (*Baker*, 75 MSPR. 156-158)

Board member Amador's criticism of the OSC is crucial in this case in that the federal ALJ recommended Petitioner

not be penalized after hearing three days of testimony, especially due to improper actions or inactions by the OSC. Pet. A49-A51, A53-A57.

Since 1984 cases have come before the Board of state employees campaigning while on State leaves of absence. Since then the Board has ordered removal for 23 of 25 state employees who were partisan candidates (not one was excused from penalty due to the *Purnell* mitigating circumstances), whereas the Board has ordered removal for only 3 of 10 federal employee "partisan" candidates. (*Purnell*, 37 MSPR 184 (1988)) Pet. 15, 24, A58-A62.

3. Respondent erred in several crucial assertions against Petitioner.

Respondent is wrong that Petitioner "...cited *DeMeo* for the first time *after* argument in the court of appeals." Res. 17, footnote 10, lines 10-13. Petitioner filed the Citation of Supplemental Authority on October 23, 1998, and Oral Argument in the Court of Appeals took place on October 29, 1999. (See Petitioner Brief in Response (BR), Appendix F, BR A1- A2) Respondent is incorrect in his criticism "...even though *DeMeo* was decided before petitioner filed his opening brief." The Board issued *DeMeo* December 22, 1997, and Petitioner filed his opening brief seven days later. Few in Washington DC know Board decisions that quickly. In the State of Michigan Law Library the most recent US MSPB Reporter is volume 80, and its most recent decision is February 9, 1999. Also, Respondent is inaccurate to criticize that "...*DeMeo* is hardly settled law." The *DeMeo* decision was scholarly and extensive, and is crucial to this case in that it so clearly demonstrates the Board's misapplication of the Hatch Act statute and the need for Supreme Court consideration of this situation.

Respondent clearly erred in asserting that Congress provided for a broader range of penalties for federal

employees because the Act prohibits more activities for federal employees. Res. 15, lines 1-5. Congress provided for broader federal penalties in the early 1960s. Pet. 27. State and federal employees were prohibited from the same activities until the early 1970s. Pet. 5, A47.

4. Respondent's Brief did not conform to Supreme Court Rules requiring that statements be accurate and tried to hinder the Court's consideration of Petitioner's clear and verified appeal.

Respondent's footnote 12 on page 21 criticized Petitioner because he did not "explain what was omitted from the record." The reason that Petitioner requested an *Olenhouse* hearing was to verify that all of the briefs and documents in this case were actually in the record. Prior to Petitioner's Olenhouse request, the OSC had "lost" Petitioner's Trial Brief, the MSPB "misplaced" Petitioner's Exhibit 4" binder, and then the MSPB sent the Official Record to the District Court in a disheveled condition. However, the District Court denied Petitioner's request for an *Olenlhouse* hearing. Thus, Petitioner was unable to find out exactly what included or missing. Pet. 22, see listing of Alexander's mitigating circumstances including these problems, A 58.

Respondent incorrectly cited the U.S. Merit Systems Protection Board Reporter as "M.S.P.B." instead of its actual cite as "M.S.P.R." Pet. IV, 12, 16-18. This may appear inconsequential, but when correlated with misstatements as described on *Baker, Edenfield, DeMeo* and *Campbell*, such Respondent confusion as to where the Court finds a citation to verify a statement can hinder the Petitioner's case.

Also, Respondent stated on page 4, lines 5-7, "At no time was petitioner ever told that he could be a candidate without violating the Hatch Act. Ibid." That statement is cited as being on page 4 of Petitioner's Brief, but it does not appear on pages 3 through 5 of the Brief.

ARGUMENT

1. The Board's pattern and practice clearly refutes Respondent's misstatements that the Board

- **a. decides harsher penalties for federal employees,**
- **b. could not have imposed a lesser penalty on Petitioner if he had been a federal employee, and**
- **c. has an identical standard of culpability for both federal and state employees.**

Respondent has clearly failed to meet the Rule 15 requirements that a brief in opposition "should address any perceived misstatement of fact or law in the petition," and "present other arguments for denying the petition." Petitioner is primarily challenging the Board's enforcement of the Act, and the Act's wording is a secondary consideration. Yet, from pages 6 to 15 Respondent exclaims the correctness of the Hatch Act's wording without offering any Board decisions to verify the Respondent claims. Finally, on page 18 Respondent states that the Board has "ordered removal in cases involving federal employees who, like petitioner, deliberately violated the prohibition on partisan candidacy." Then Respondent correctly listed Dominguez, and incorrectly listed Carney and Johnson. Unlike Petitioner and Dominguez, Carney and Johnson were formally warned by the OSC and they went on to violate the Act a second time. Pet. A 62. Only on page 18 does Respondent offer any actual Board decisions to verify Respondent's claims.

Since 1984 the Board has made decisions to penalize 10 federal employees for partisan candidacy, and it has ordered the removal of Dominguez, Carney and Johnson, which means termination for a federal employee. Petitioner has already discussed how Baker, Campbell and Edenfield were suspended instead of removed because they were formally warned. Petitioner's case is more like federal employees Bradford, Walker, Andrezjwski, and Reckard - all of whom were not formally warned and the

first three were suspended and Reckard allowed to retire (which is far better than dismissal). During that same time period the Board has decided that 25 of 25 state employees violated the Act by partisan candidacy, and the Board ordered the removal of 23 state employees and allowed 2 to retire instead of being removed. Pet. A58-62.

Petitioner has met the Rule 14(2) requirements to verify his assertions. Respondent inaccurately claimed that the Board decides harsher penalties for federal employees or less harsh penalties for state employees. Res. 6, lines 17-24; 8, lines 16-22; 9, footnote 5; 13, lines 15-16; 14, lines 19-21; and 15, lines 16-19. Respondent asserts a false distinction that some of the Board's decisions involving federal employees were "non-final decisions" without naming any actual cases, and somehow those decisions were not comparable to state employee decisions. Res. 9, footnote 5. The Board made those decisions, and its decisions are comparable. Conclusively, Petitioner's facts refute Respondent's claims. Pet 5, 15, 23-24 and A58-A62.

Respondent inaccurately claimed that the Board could not have imposed a lesser penalty on Petitioner if he had been a federal employee. Res. 7, lines 7-9; 12, lines 16-28, and 15, lines 16-19. Again, the Petitioner's facts refute those claims. Pet 5, 15, 23-24, 26-30 and A58-A62.

Respondent inaccurately claimed that the Board has an identical standard of culpability for both federal and state employees. Res. 10, footnote 5; 11, lines 16-19; and 12, lines 13-15. Again, the Petitioner's facts refute those claims, especially the manner in which the Board suspended Baker, Campbell, Edenfield, and also suspended Bradford, Walker, Andrezjwski. All those federal employees were candidates for partisan office and all were suspended, yet Petitioner and 24 other state employees were ordered removed. Pet 5, 15, 23-24, and A58-A62.

2. Respondent purposely reiterates factual misstatements by the Board, District Court, and Appeals Court that Petitioner correctly and extensively documented in initial briefs to District and Appeals Courts.

The Respondent wrongly asserted as facts many errors and misstatements first made in the Board's Final Decision, repeated in the District Court Opinion, and reiterated in the Court of Appeals decision. Petitioner provided extensive refutation of the Board's 102 errors and misstatements in his Formal Objection to MSPB's Factual Findings in its Final Decision. The Formal Objection was filed with the District Court on March 21, 1997, and again filed in the Joint Appendix (pages 841-860) for the Court of Appeals on March 4, 1998. Relevant portions of the Formal Objection appear as Appendix G, BR A4-A9, and full copies of the Formal Objection have been "lodged in" with the Clerk of the Supreme Court. The Respondent's wrong assertions in quotation marks followed by the facts include:

Res. 3, line 33 to 4, line 2 "..he did not find Servais' and Weintraub's explanations satisfactory because they did not provide written verification or legal citations.." Respondent did not state that almost half of their explanations were wrong, and many others were not verified. (BR A8)

Res. 4, lines 23-25 "..an OSC investigator ...further explained the Hatch Act to him." The investigator only clarified Petitioners misunderstanding about the withholding of twice his annual salary. (Pet. 10, A54, A57, item 19)

Res. 5, lines 2-4 "..petitioner not be removed from his job because OSC failed to take a more active measure to dissuade him from violating the Act." The federal ALJ wrote that "the actions of the Petitioner [OSC] significantly contributed to Respondent's [Alexander] assumption of the risk." (Pet. 8, A36, A49-A51, and BR A8)

Res. 6, lines 12-16 "petitioner lacked standing to raise an equal protection challenge to the penalty provisions

because he was not harmed by the differences he sought to challenge..." Similar misstatements appear on p. 12, lines 33-35. Compared to federal employees Bradford, Walker, Andrezjwski, and Reckard, Petitioner was harmed due to the different penalties for state and for federal employees.

Res. 12, lines 10-11 "He was repeatedly warned." OSC Public Information Officer Paul Ellis explained the difference between opinions without verification, such as Petitioner received, and formal OSC warnings. (Pet. 10, A54, BR A8, p. 11, line 22)

Res. 16, line 26 "He was perfectly willing to violate the Hatch Act." ALJ declared the exact opposite. (A54-57, BR A8, p. 11, line 22)

Res. 18, last line "Petitioner was told by everyone that he could not be a candidate without violating the Act." Most said they did not know. Only Servais and Weintraub stated he was covered, and they did not verify their opinions. (BR A9, p 17, li 20)

3. Respondent purposely misstates the significance of the different *Olenhouse* interpretations by the Fifth, Sixth and Tenth Courts of Appeals.

CONCLUSION

WHEREFORE, Petitioner requests that this Court issue its writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit to review the decision of that Court in Petitioner's case.

Respectfully Submitted,

George V. Warren (P21996)
Counsel of Record
847 W. Willow, Nandy House
Lansing, Michigan 48906
(517) 484-5050

EXHIBITS BY PETITIONER

F. CITATION OF SUPPLEMENTAL AUTHORITY

George V. Warren, Attorney
847 W. Willow
Lansing, Michigan 48906
517-484-5050

October 23, 1998

Leonard Green, Clerk
US Court of Appeals, Sixth Circuit
Potter Stewart U.S. Courthouse
100 East Fifth Street, Room 532
Cincinnati, Ohio . 45202-3988

Eric D. Flores
Merit System Protect'n Board
1120 Vermont Ave, NW,
Suite 816
Washington, D.C. 20419

David Gorman
Office of Special Counsel
1730 M Street, N.W.,
Suite 300
Washington, D.C. 20036

Michael Hayes Dettmer,
U.S. Attorney
Southern Division
P O Box 208
Grand Rapids, Michigan 49501

Janet Reno,
U.S. Attorney General
10th & Constitution Ave, NW
Washington, DC 20530

William Kanter and Carl E. Goldfarb
Civil Division, Appellate Staff
US Department of Justice
601 D Street, N. W., Rm 9541
Washington, D.C. 20530-0001

RE: **CITATION OF SUPPLEMENTAL AUTHORITY**
97 - 2131 Alexander v. Merit Systems Protection Board
District Court No. 5: 96-CV-180

Dear Mr. Green:

The Appellant, Robert D. Alexander, would like to cite to the Court supplemental authority. The cases Appellant wishes to cite to the Court are SPECIAL COUNSEL v. DeMEO [77 M.S.P.R. 158 (1997)] and SPECIAL COUNSEL v. McDONALD [77 M.S.P.R. 675 (1997)].

The Appellant cites the Court in SPECIAL COUNSEL v. DeMEO specific pages 160, 161, 162, 166, 167, 168, and 173, and the excellent overall Analysis from pages 160-174 of the penalty provisions for federal employees who violate the Hatch Act. The reason Appellant cites this supplemental authority is because Appellant did not find a similar Analysis by the M.S.P.B. of the penalty provisions for state employees who violate the Hatch Act in any of the Board's 33 Final Decisions against state employees from 1984 to 1997. The specific items are:

page 160 "We find that this statutory prohibition....is ambiguous on its face, and is susceptible of several plausible interpretations." For state employees "coverage" by the Hatch Act, "violation" of the Act, "removal" and other words in the statute are equally "ambiguous on its face, and is susceptible of several plausible interpretations."

pp. 161-162 "debarment is a penalty, and a severe one." "when a statute imposes penalties, 'it must do so in clear terms to avoid unfairness [and]arbitrary enforcement.' " "...in favor of persons on whom penalties are sought to be imposed." "...not construing statutes in favor of the offender violate due process." "[W]here there is doubt concerning the severity of the penalty prescribed by a statute, a milder penalty over a harsher one will be favored." "permanent debarment from federal employment is "punishment ... of a most severe type," which Congress invoked only for "special types of odious and dangerous crimes." United States v. Lovett,"

p. 166 The Analysis stated that "Congress used explicit language to debar State and local employees from future employment, precisely specifying both the scope of the debarment and its

duration." Appellant's Briefs and Addendum B demonstrate that the penalty for state employees has NOT been precisely applied.

p. 167 "the mandatory penalty" [of termination for federal employees] "was too harsh for minor or inadvertent violations of the Act," so a suspension of at least ninety days was added.

p. 168 "..the 1950 Congress believed that the effect of a removal [of a federal employee] for violation of the Hatch Act was a complete and permanent debarment from all federal employ-ment. There is no explanation in the legislative history..." Appellant found extensive verification of permanent termination in the 1939 Congressional Record of the testimony during debate.

p. 173 "...in all Board cases where the penalty of removal was imposed" [on federal employees] "for violation of the Hatch Act, no debarment was imposed. See Lee, 58 M.S.P.R. at 93; Dominguez, 55 MSPR 652, 653 (1992); Johnson, 26 MSPR 562.."

The Appellant cites the Court in SPECIAL COUNSEL v. McDONALD the following specific statement on page 677, "..McDonald would resign from his employment with OMRDD effective June 4, 1997; that, thereafter, he would be debarred for eighteen months from reemployment in any position in a State or local agency in the State of New York." Appellant asserts that the penalty for state employees so clearly stated in McDonald, debarred for eighteen months, did not appear in any of the prior 33 Board decisions for state or local employees from 1984 to 1997.

Also, Appellant acknowledges that his Olenhouse Motion and Brief in Support were mistakenly placed in reverse order on pages 824 to 821 in the Joint Appendix.

Respectfully submitted,

George V. Warren (P 21996)
Attorney for the Plaintiff-Appellant
Robert D. Alexander

G. **Petitioner's Formal Objections to MSPB's Factual Findings in its Final Decision, filed March 21, 1997, in U.S. District Court and filed March 4, 1998, in U.S. Sixth Circuit Court of Appeals.**

{ note: Complete copies of Appendix G were lodged in with the Clerk of the Supreme Court on July 23, 1999. Appendix G refers extensively to the federal Adm. Law Judge's Recommended Decision (RD). RD pages 56-57 and 65-72 are App. D to the Petition, A46-57, and full copies of the RD were lodged in with the Clerk of the Supreme Court on April 12, 1999. In the Formal Objections below, when RD pages are cited that appear in App. D, the App. D page numbers are listed as "{A47}." }

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT D. ALEXANDER,
Petitioner

v. No.
MERIT SYSTEMS PROTECTION BOARD 5:96-CV-180
and OFFICE OF SPECIAL COUNSEL,
Respondents.
_____/

PETITIONER ALEXANDER'S FORMAL OBJECTIONS TO THE MERIT SYSTEMS PROTECTION BOARD'S FACTUAL FINDINGS IN ITS FINAL DECISION AND ORDER

The Petitioner, Robert Alexander, hereby submits through his Attorney, George Warren, the following formal objections to the Merit Systems Protection Board's (MSPB) factual findings in its FINAL DECISION AND ORDER, issued October 4, 1996, in the above-captioned matter.

I. INTRODUCTION

Pursuant to 5 U.S.C. § 1508 this Court shall review the entire record including questions of fact and questions of law, in response to Mr. Alexander's PETITION FOR JUDICIAL REVIEW ... of the MSPB's FINAL DECISION (FD) and MOTION FOR STAY of the MSPB's removal ORDER. This Court has ordered a stay and Petitioner has been suspended by his Department of Community Health (DCH).

Petitioner Alexander submits that these objections of the MSPB's factual findings will refute the Board's version of the facts, and its findings based those facts, which are not supported by substantial evidence in the record. Petitioner will more than exceed the applicable substantial evidence standard of review as stated by Respondent MSPB in its MOTION TO AFFIRM, p. 12. ... Under this standard, this Court must deny the Board's factual findings if they are not supported by substantial evidence in the record. Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992). Petitioner will refute most of the Board's findings in his verification of the actual facts in this matter. Petitioner has not just identified alternative findings that may also be supported by substantial evidence. (Ibid., 113) Petitioner's actual facts, and not the Board's version of the facts, will meet the substantial evidence standard that "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Pernales, 402 U.S. 389, 401 (1971). Consequently, Petitioner asserts that the Board **did abuse** its discretion in determining that Mr. Alexander's alleged violation of the Hatch Act warranted his removal.

II. ARGUMENT

A page by page, line by line review of MSPB's FINAL DECISION will reveal the false nature of the facts asserted by the Board and the true nature of the actual facts as verified by Petitioner. In this review Petitioner Alexander is Respondent, the Respondent MSPB is the Board, and the Respondent OSC is Petitioner. The format for this analysis will be:

Page number, Line number, "false assertion by the Board"[actual fact by Petitioner, verification of the fact].

p. 2, li. or ls. 7 "violation warranted removal" [mitigation merited retaining position, RD pp. 71-72]

The critical false word or words in a MSPB or OSC assertion often will be bolded for emphasis. ...

Included in the 102 errors are 12 misquotes of the ALJ that are totally opposite of his statements:

p. 4, ls. 1-2 "this experience engendered in him **the attitude** that he would not accept the legal opinions of others absent supporting legal citations. See RD 31-32, 57." [actual RD p. 57- "he perceived that he had reason to distrust his agency's Human Resources Office and its advice. Respondent's distrust was based on a number of DSS actions..."] {A48}

p. 11, li. 22 to p. 12, li. 1 "ALJ found that Mr. Alexander knowingly and willfully violated the Hatch Act by pursuing his candidacy in the face of **many warnings** to the contrary." ["While the admonitions received by Respondent (from Kemp, Servais and Weintraub) are insufficient in and of themselves to prove that Respondent knowingly and willfully violated the Hatch Act...."RD p. 67.] {A51}

p. 15, li. 16 to p. 16, li. 3 "ALJ found that Mr. Alexander knowingly and willfully violated the Hatch Act because the warnings Mr. Alexander received from his supervisor....and OSC were sufficient to notify a reasonably prudent person that his candidacy would violate the Hatch Act." [Ibid. and "the advice of Dr. Kemp...is of little weight in supporting removal." and "Servais' actions and advice do not support removal." RD p. 68.] {A52-A53}

p. 16 ls. 5-6 "This conclusion is incorrect" that Kemp, Servais and Weintraub were insufficient in themselves to prove

Respondent violated the Act. [Ibid. and "OSC's actions do not support removal." RD at 69.] {A53}

p. 17 ls. 7-9 "The record fully supports the ALJ's finding that Mr. Alexander knowingly and willfully violated the Hatch Act." [Ibid.] {A53}

p. 18 ls. 8-10 "We reject the ALJ's conclusion that the advice of Mr. Weintraub, Mr. Servais, and Dr. Kemp cannot support a determination that removal is warranted." [Ibid.] {A53}

p. 18 ls. 10-11 "ALJ's findings of fact....not supported by the record." [Ibid.] {A53}

p. 18, li. 18 to p. 19, l. 1 ALJ criticized "Weintraub's warning merely because she was abrupt or because she did not provide him an unsolicited written opinion." [Ibid.] {A53}

p. 19 ls. 5-8 He disregarded advice of his agency's personnel office and his supervisor because "he success-fully challenged a personnel action in the past." [Ibid.] {A53}

p. 19 ls. 11-12 Kemp and Servais' advice was "correct and consistent with that of each other and with that of Ms. Weintraub." [Ibid.] {A53}

p. 19 ls. 15-16 and footnote 5 "**We find no evidence** of a political attempt by DSS to have Mr. Alexander prosecuted."[ALJ did find evidence. RD pp. 64, 65, 68.] {A48, 52-53}

p. 22 ls. 3-5 "His selective crediting of the advice he received cannot be justified by his purported standard of requiring supporting legal citations." [His "efforts to get clarification regarding the Hatch Act were symbolic of Respondent's doggedness and hard headedness which Dr. Kemp indicated that Respondent employs on every issue." RD p. 57.] {A47-48}

Formal Objections to the MSPB's Factual Findings in the FINAL DECISION AND ORDER

p. 2, line 7 "his violation was of such a scope and effect as to **warrant removal** from his position." [The ALJ who heard all the testimony and wrote 70 page, single-spaced RD recommended that the "**Board impose no sanction**." p. 72] {A57}

p. 2, ls. 18-19 "The written record, along with the testimony introduced at two hearings, reflects the following, **largely uncontested** facts:" [Respondent does not contest the facts listed on page 3, lines 1-14, but much of the remainder of FD's BACKGROUND section to page 13, line 7, is vigorously contested by the Respondent!].

p. 11, li. 22 to p. 12, li. 1 "ALJ found that Mr. Alexander knowingly and willfully violated the Hatch Act by pursuing his candidacy in the face of **many warnings** to the contrary." [**ALJ wrote the exact opposite! "While the admonitions received by Respondent (from Kemp, Servais and Weintraub) are insufficient in and of themselves to prove that Respondent knowingly and willfully violated the Hatch Act**...." RD at 67, {A51} ls 2-4. OSC's Ellis explained the difference between an "opinion" and a "warning" from OSC. Tr. I, p. 256 The **Respondent received no warnings**.] [ALJ declared the testimony of both Mr. Kemp and Mr. Servais as not credible. ALJ stated the Respondent was covered by the Hatch Act, but that **he did not knowingly and willfully violate the Hatch Act due to OSC:** not answering his questions in April 1992, not issuing him a written warning after OSC became aware of his candidacy, and not telling him of the option to drop out of the race and OSC would end its investigation of him (as was done in Kelley). RD at 63-67.] {A48-51}

p. 15, li. 16 to p. 16, li. 3 "ALJ found that Mr. Alexander knowingly and willfully violated the Hatch Act because the warnings Mr. Alexander received from his supervisor....and OSC were sufficient to notify a reasonably prudent person that

his candidacy would violate the Hatch Act." **[ALJ stated the opposite, RD at 67; .....]** {A51}

p. 17 ls. 7-9 "The record fully supports the ALJ's finding that Mr. Alexander knowingly and willfully violated the Hatch Act." **[ALJ stated the opposite!** See p. 11, li. 22 above.] {A51}

p. 17 ls. 8-9 "Mr. Alexander does not challenge that finding." (no citation) **[FD statement could be no farther from the truth** as demonstrated throughout this proceeding. Respondent provided many exhibits and specifically challenged the alleged violation of the Hatch Act in the Trial Brief By Respondent, Argument by Respondent #1 Was Respondent Covered by the Hatch Act? pp. 1-7; #2 Did Respondent knowingly and willfully violate the Hatch Act?....]

p. 17 li. 20 "No one advised him to the contrary." (no citation) [If government officials do not verify their statements, their opinions are not law. Servais and Weintraub, as Hatch Act experts, were expected to verify their opinions and they did not do so. Also, Respondent provided extensive testimony that others did provide materials that questioned if DSS or Medicaid reimbursed employees were covered by the Hatch Act. Trial Brief, Stipulations by Respondent, Leland pp. 11, 15; MI Dept. of Civil Service p. 11; Gary Gordon p. 14; .]

Respectfully submitted,

Dated: March 21, 1997

George V. Warren,
Attorney for Petitioner,
Address: 412 W. Grand River Ave.,
Lansing, Michigan, 48906
Telephone: 517-482-7751